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WHEN: Tuesday, February 12, 2013
9 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741–6008

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2012–0642]

RIN 1625–AA00

Safety Zone: Gilmerton Bridge Center Span Float-in, Elizabeth River; Norfolk, Portsmouth, and Chesapeake, VA

AGENCY: Coast Guard, DHS.

ACTION: Interim Temporary Final Rule.

SUMMARY: The Coast Guard will establish a temporary safety zone on the navigable waters of the Elizabeth River in Norfolk, Portsmouth, and Chesapeake, VA. This action is necessary to provide for the safety of life on navigable waters during the Gilmerton Bridge Center Span Float-in and bridge construction of span placement. This action is intended to restrict vessel traffic movement to protect mariners from the hazards associated with the float-in and span placement.

DATES: This rule will be effective from January 7, 2013 through January 16, 2013. The rule is scheduled to be enforced from 6:00 a.m. on January 7, 2013 through January 11, 2013, with inclement weather dates of January 12, 2013 through January 16, 2013. Comments and related material must be received by the Coast Guard on or before December 26, 2012.

ADDRESSES: You may submit comments identified by docket number using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov*.

(2) *Fax:* 202–493–2251.

(3) *Mail or Delivery:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Deliveries accepted between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays. The telephone number is 202–366–9329. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for further instructions on submitting comments. To avoid duplication, please use only one of these three methods.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2012–0642 and are available online by going to *http://www.regulations.gov*, inserting USCG–2012–0642 in the ''Search'' box, and then clicking ''Search.'' They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or email LCDR Hector Cintron, Waterways Management Division Chief, Sector Hampton Roads, Coast Guard; telephone 757–668–5581, email *Hector.L.Cintron@uscg.mil*. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking

A. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

1. Submitting Comments

If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online at *http://www.regulations.gov*, or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online, it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov*, type the docket number (USCG–2012–0426) in the ''SEARCH'' box and click ''SEARCH.'' Click on ''Submit a Comment'' on the line associated with this rulemaking.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

2. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov*, type the docket number (USCG–2012–0426) in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

3. Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the

individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

4. Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one, using one of the methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

B. Regulatory History and Information

On July 25, 2012, the Coast Guard published a notice of proposed rulemaking (NPRM) proposing a safety zone in the Gilmerton Bridge Area (77 FR 43557) on September 5–9, 2012. We received no comments on the proposed rule.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Because of shifting construction schedules, the Coast Guard was unable to determine the precise date of the construction until recently. Therefore, waiting for a 30 day notice period to run would have been impracticable.

C. Basis and Purpose

On January 7, 2013 through January 11, 2013, with inclement weather dates of January 12, 2013 through January 16, 2013, PCL Civil Construction, Inc. will facilitate removal of the existing bascule spans from the Gilmerton Bridge, transport of the new center span from the Eastern Branch of the Elizabeth River at the Campostella Bridge to the Southern Branch of the Elizabeth river at the Gilmerton Bridge in Norfolk, Portsmouth, and Chesapeake, VA and the placement of the center span at the Gilmerton Bridge in Chesapeake, VA. There is a danger of falling debris during the removal of the existing structures and installation of the new bridge span. Due to the need to protect mariners and the public transiting the Elizabeth River from hazards associated with the span move and construction of span placement, the Coast Guard has determined that a moving safety zone and an extended waterway closure at the Glimerton Bridge is necessary for public safety purposes.

D. Discussion of Final Rule

The Captain of the Port Hampton Roads is establishing a temporary moving safety zone around the Gilmerton Bridge center span barge, restricting vessels operating in the navigable waters on the Elizabeth River from the Campostella Bridge located in the Eastern Branch of the Elizabeth River to the Gilmerton Bridge. The purpose of this rule is to protect mariners and the public transiting the Elizabeth River from hazards associated with the span move, construction and placement. This movement is scheduled to begin at 6 a.m. on January 7, 2013, weather permitting. Because of the size of the barge and the width of the waterway, vessels will not be able to transit around the barge, necessitating closure of the entire waterway from the Campostella Bridge to the Gilmerton Bridge. Transit is expected to take approximately seven hours. This action is necessary to ensure the safety of PCL Construction and vessels immediately prior to, during, and following the transit of the span.

In addition to the moving safety zone, the Coast Guard will establish a temporary safety zone and extended waterway closure at the Gilmerton Bridge starting at 6 a.m. on January 7, 2013, weather permitting, until January 11, 2013. This safety zone will be established in the interest of public safety during span placement at the Gilmerton Bridge. The inclement weather dates are January 8, 2013 through January 12, 2013. This temporary safety zone will encompass the waters directly under and 200 feet on either side of the Gilmerton Bridge, crossing the Elizabeth River. Except for vessels authorized by the Captain of the Port or his Representative, no person or vessel may enter or remain in the safety zone during the time frame listed. Coast Guard Captain of the Port will give notice of the enforcement of the safety zone by all appropriate means to provide the widest dissemination of notice among the affected segments of the public. This will include publication in the Local Notice to Mariners and Marine Information Broadcasts. Marine information and facsimile broadcasts may also be made for these events, beginning 24 to 48 hours before the event.

While this construction was originally scheduled to commence in September, 2012, construction has been delayed due to scheduling concerns and other logistical issues. For these reasons, the effective date in this final rule has been rescheduled to January 7, 2013.

E. Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. The primary impact of these regulations will be on vessels wishing to transit the affected waterways during the moving safety zone accompanying the Glimerton Bridge Span Barge and the safety zone at the Gilmerton Bridge beginning at 6 a.m. on January 3, 2013 through January 7, 2013 with inclement weather dates of January 8, 2013 through January 12, 2013. Although these regulations prevent traffic from transiting a portion of the Elizabeth River during these events, that restriction is limited in duration, affects only a limited area, and will be well publicized to allow mariners to make alternative plans for transiting the affected area. This regulation is designed to ensure such transit is conducted in a safe and orderly fashion.

2. Impact Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered the impact of this rule on small entities. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which might be small entities: The owners or operators of vessels intending to operate or anchor in portions of the Elizabeth River, in Virginia. The regulations would not have a significant impact on a substantial number of small entities for the following reasons: The restrictions are limited in duration, it affects only limited areas, and will be well publicized to allow mariners to make alternative plans for transiting the affected areas.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a

significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact LCDR Hector Cintron, Waterways Management Division Chief, Sector Hampton Roads, Coast Guard; telephone 757–668–5581, email *Hector.L.Cintron@uscg.mil.* The Coast Guard will not retaliate against small entities that question or complain about this temporary rule or any policy or action of the Coast Guard.

4. Collection of Information

This rule will call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

7. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

8. Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

9. Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

10. Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

11. Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

12. Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

13. Technical Standards

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

14. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. Upon receipt of consultation comments all documentation will be made available in the docket where indicated under **ADDRESSES**. This rule involves establishing a temporary safety zone. An environmental analysis checklist and a categorical exclusion determination will be available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add temporary § 165.T05–0642 to read as follows:

§ 165.T05–0642 Safety Zone; Gilmerton Bridge Center Span Float-in, Elizabeth River; Norfolk, Portsmouth, and Chesapeake, Virginia.

(a) *Regulated Area.* The following area is a safety zone: Regulated Area 1: All waters of the Eastern Branch of the Elizabeth River starting 400 feet behind the Gilmerton Bridge center span barge and extending to the entrance of the Southern Branch of the Elizabeth River and continuing south in the Southern Branch of Elizabeth River to the Gilmerton Bridge in the vicinity of Norfolk, Portsmouth and Chesapeake, VA. As the Gilmerton Bridge center span barge transits through the waterway, the northern portions of the waterway will reopen. Regulated Area 2: All waters of the Southern Branch of the Elizabeth River directly under and 200 feet on either side of the Gilmerton

Bridge in the vicinity of Chesapeake, VA.

(b) *Definition.* For the purposes of this part, *Captain of the Port Representative* means any U.S. Coast Guard commissioned, warrant or petty officer who has been authorized by the Captain of the Port, Hampton Roads, Virginia to act on his behalf.

(c) Regulations. (1) In accordance with the general regulations in 165.23 of this part, entry into this zone is prohibited unless authorized by the Captain of the Port, Hampton Roads or his designated representatives.

(2) The operator of any vessel in the immediate vicinity of this safety zone shall:

(i) Stop the vessel immediately upon being directed to do so by any commissioned, warrant or petty officer on shore or on board a vessel that is displaying a U.S. Coast Guard Ensign.

(ii) Proceed as directed by any commissioned, warrant or petty officer on shore or on board a vessel that is displaying a U.S. Coast Guard Ensign.

(3) The Captain of the Port, Hampton Roads can be reached through the Sector Duty Officer at Sector Hampton Roads in Portsmouth, Virginia at telephone Number (757) 668–5555.

(4) The Coast Guard Representatives enforcing the safety zone can be contacted on VHF–FM marine band radio channel 13 (165.65Mhz) and channel 16 (156.8 Mhz).

(d) *Enforcement Period* This regulation will be enforced starting at 6 a.m. on January 3, 2013 through January 7, 2013 with inclement weather dates of January 8, 2013 through January 12, 2013.

Dated: November 29, 2012.

John K. Little,

Captain, U.S. Coast Guard, Captain of the Port Hampton Roads.

[FR Doc. 2012–29828 Filed 12–10–12; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2012–0119; FRL–9759–9]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia; The 2002 Base Year Emissions Inventory for the Huntington-Ashland, WV–KY–OH Nonattainment Area for the 1997 Fine Particulate Matter National Ambient Air Quality Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving the fine particulate matter ($PM_{2.5}$) 2002 base year emissions inventory portion of the West Virginia State Implementation Plan (SIP) revision submitted by the State of West Virginia, through the West Virginia Department of Environmental Protection (WVDEP), on May 28, 2009. The emissions inventory is part of the May 28, 2009 SIP revision that was submitted to meet nonattainment requirements related to the West Virginia portion of the Huntington-Ashland, WV–KY–OH nonattainment area for the 1997 $PM_{2.5}$ National Ambient Air Quality Standard (NAAQS). EPA is approving the 2002 base year $PM_{2.5}$ emissions inventory in accordance with the requirements of the Clean Air Act (CAA).

DATES: This final rule is effective on January 10, 2013.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2012–0119. All documents in the docket are listed in the *www.regulations.gov* Web site. Although listed in the electronic docket, some information is not publicly available, i.e., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the West Virginia Department of Environmental Protection, Division of Air Quality, 601 57th Street SE., Charleston, West Virginia 25304.

FOR FURTHER INFORMATION CONTACT: Asrah Khadr, (215) 814–2071, or by email at *khadr.asrah@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Throughout this document, whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. On October 2, 2012 (77 FR 60085), EPA published a notice of proposed rulemaking (NPR) for the State of West Virginia. The NPR proposed approval of the 2002 base year emissions inventory portion of the West Virginia SIP revision submitted by the State of West Virginia on May 28, 2009.

II. Summary of SIP Revision

The 2002 base year emissions inventory submitted by WVDEP on May 28, 2009 includes emissions estimates that cover the general source categories of point sources, non-road mobile sources, area sources, on-road mobile sources, and biogenic sources. The pollutants that comprise the inventory are nitrogen oxides (NO_X), volatile organic compounds (VOCs), $PM_{2.5}$, coarse particles (PM_{10}), ammonia (NH_3), and sulfur dioxide (SO_2). EPA has reviewed the results, procedures and methodologies for the base year emissions inventory submitted by WVDEP. The year 2002 was selected by WVDEP as the base year for the emissions inventory per 40 CFR 51.1008(b). A discussion of the emissions inventory development as well as the emissions inventory can be found in the May 28, 2009 SIP submittal and in the NPR. Specific requirements of the base year inventory and the rationale for EPA's action are explained in the NPR and will not be restated here. No public comments were received on the NPR.

III. Final Action

EPA is approving the 2002 base year $PM_{2.5}$ emissions inventory as a revision to the West Virginia SIP.

IV. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely

affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

• Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law. 5 U.S.C. 804(2).

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [*Insert date 60 days from date of publication of this document in the* **Federal Register**]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action pertaining to the $PM_{2.5}$ 2002 base year emissions inventory portion of the West Virginia SIP may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: November 21, 2012.

W.C. Early,

Acting Regional Administrator, Region III.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart XX—West Virginia

■ 2. In § 52.2520, the table in paragraph (e) is amended by adding at the end of the table an entry for 2002 Base Year Emissions Inventory for the 1997 fine particulate matter ($PM_{2.5}$) standard to read as follows:

§ 52.2520 Identification of plan.

* * * * *

(e) * * *

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
*	*	*	*	*
2002 Base Year Emissions Inventory for the 1997 fine particulate matter ($PM_{2.5}$) standard.	West Virginia portion of the Huntington-Ashland, WV-KY-OH nonattainment area.	5/28/09	12/11/12 *[Insert page number where the document begins]*.	52.2531(b)

■ 3. § 52.2531 is amended by revising the section heading, designating the existing paragraph as paragraph (a), and adding paragraph (b). The amendments read as follows:

§ 52.2531 Base year emissions inventory.

* * * * *

(b) EPA approves as a revision to the West Virginia State Implementation Plan the 2002 base year emissions inventory for the Huntington-Ashland, WV-KY-OH fine particulate matter ($PM_{2.5}$) nonattainment area submitted by the West Virginia Department of Environmental Protection on May 28, 2009. The 2002 base year emissions inventory includes emissions estimates that cover the general source categories of point sources, non-road mobile sources, area sources, on-road mobile sources, and biogenic sources. The pollutants that comprise the inventory are nitrogen oxides (NO_X), volatile organic compounds (VOCs), $PM_{2.5}$, coarse particles (PM_{10}), ammonia (NH_3), and sulfur dioxide (SO_2).

[FR Doc. 2012–29763 Filed 12–10–12; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 99–25; FCC 12–144]

Implementation of the Local Community Radio Act of 2010; Revision of Service and Eligibility Rules for Low Power FM Stations

AGENCY: Federal Communications Commission.

ACTION: Denial and/or dismissal of petitions for reconsideration.

SUMMARY: In this document, the Commission acts on six petitions for reconsideration of the Fourth Report

and Order, challenging the per-market and/or the national caps adopted in the Fourth Report and Order in this proceeding. In response to the petitions for reconsideration, the Commission modifies the national cap to allow each applicant to pursue up to 70 applications, so long as no more than 50 of them are in the spectrum-limited radio markets identified in the Fourth Report and Order; increases the per-market cap for spectrum-limited markets to allow up to three applications per applicant for each market, subject to certain conditions; and clarifies the application of the per-market cap in ''embedded'' markets.

DATES: Effective January 10, 2013.

FOR FURTHER INFORMATION CONTACT: Peter Doyle (202) 418–2789.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Fifth Order on Reconsideration in MM Docket No. 99–25, FCC 12–144, adopted November 30, 2012, and released December 4, 2012. The full text of this document is available for inspection and copying during regular business hours in the FCC Reference Center, 445 Twelfth Street SW., Room CY–A257, Portals II, Washington, DC 20554, and may also be purchased from the Commission's copy contractor, BCPI, Inc., Portals II, 445 Twelfth Street SW., Room CY–B402, Washington, DC 20554. Customers may contact BCPI, Inc. via their Web site, *http://www.bcpi.com,* or call 1–800–378–3160. This document is available in alternative formats (computer diskette, large print, audio record, and Braille). Persons with disabilities who need documents in these formats may contact the FCC by email: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

Paperwork Reduction Act Analysis. This Order on Reconsideration does not adopt any new or revised information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13 (44 U.S.C. 3501–3520). In addition, therefore, it does not contain any new or modified ''information collection burden for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4).

Report to Congress. The Commission will send a copy of this Order on Reconsideration to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

Summary of Fifth Order on Reconsideration

I. Introduction

1. In this *Fifth Order on Reconsideration and Sixth Report and Order,* we take various actions to implement the Local Community Radio Act of 2010 (''LCRA''), safeguard the integrity of our FM translator licensing procedures and modify licensing and service rules for the low power FM (''LPFM'') service. In the *Fifth Order on Reconsideration* we affirm with slight modifications and clarifications the comprehensive plan for licensing FM translators and LPFM stations adopted in the *Fourth Report and Order* (Fourth R&O). In response to petitions for reconsideration, we modify the national cap to allow each applicant to pursue up to 70 applications, so long as no more than 50 of them are in the Appendix A markets. We also increase the per-market cap for radio markets identified in Appendix A of the *Fourth R&O* to allow up to three applications for each market, subject to certain conditions. We also clarify the application of the per-market cap in those Appendix A markets with ''embedded'' markets. In the *Sixth Report and Order* we complete the implementation of the LCRA and make a number of additional changes to promote the localism and diversity goals of the LPFM service and a more sustainable community radio service. When effective, these orders will permit the Commission to move forward with the long-delayed processing of over 6,000 FM translator applications and establish a timeline for the opening of an LPFM window.

II. Fifth Order on Reconsideration

A. Background

2. On July 12, 2011, the Commission released a *Third Further Notice of Proposed Rule Making* (Third FNPRM) in this proceeding, seeking comment on the impact of the LCRA on the procedures previously adopted to process the approximately 6,000 applications that remain pending from the 2003 FM non-reserved band translator window. There, the Commission tentatively concluded that those licensing procedures, which would limit each applicant to ten pending applications, would be inconsistent with the LCRA's goals. We proposed to modify those procedures and instead adopt a market-specific translator application dismissal process, dismissing pending translator applications in identified spectrum-limited markets in order to preserve adequate LPFM licensing opportunities. At the same time, we tentatively concluded that these new procedures would not be sufficient to address the potential for licensing abuses with respect to the thousands of pending translator applications. Accordingly, we asked for comments on appropriate processing policies for those applications, including a potential national cap of 50–75 applications and a potential cap of one or a few applications in any particular market.

3. The Commission released the *Fourth R&O* on March 19, 2012. The Commission affirmed its decision to reject the prior national cap of 10 translator applications per applicant. It adopted a modified market-specific translator licensing scheme which incorporated a number of commenter proposals. To minimize the potential for speculative licensing conduct, the Commission established a national cap of 50 applications and a local cap of one application per applicant per market for the 156 Arbitron Metro markets identified in Appendix A of the *Fourth R&O.*

1. Rationale for the Translator Application Caps

4. When the Commission opened the March 2003 filing window for Auction 83 FM translator applications, there were 3,818 licensed FM translators. 13,377 translator applications were filed in that window—approximately three times as many applications as the number of FM translators licensed since 1970. From that group, 3,476 new authorizations were issued before the Commission's freeze on further processing of applications from that window took effect. Of those 3,476 authorizations, 926 (more than 25 percent) were never constructed and 1,358 (almost 40 percent) were assigned to a party other than the applicant. Although 97 percent of all filers filed fewer than 50 applications, the remaining three percent accounted for a total of 8,163 applications, representing 61 percent of the total. The two largest filers, commonly-owned Radio Assist Ministries, Inc. and Edgewater Broadcasting, Inc. (collectively, ''RAM''), filed 4,219 applications and received 1,046 grants before the processing freeze took effect. When we adopted the cap of ten applications in 2007, we noted that RAM had sought to assign more than 50 percent of the construction permits it had received and consummated more than 400 assignments of such permits. We based the cap of ten applications on the need to preserve spectrum for future LPFM availability and the need to protect the

integrity of our translator licensing process.

5. In the *Third FNPRM,* when we proposed to replace the cap of ten translator applications with a market-specific processing system, we tentatively concluded that such a processing system would not be sufficient to address the potential abuses in translator licensing and trafficking. We noted that the vast majority of applicants hold only a few applications, but the top 20 applicants collectively account for more than half of the pending applications. Similar imbalances exist in particular markets and regions. For instance, one applicant holds 24 of the 24 translator applications proposing operation within 20 kilometers of Houston's reference coordinates and 73 applications in Texas. Two applicants hold 66 of the 74 applications proposing service to the New York City radio market.

6. We also described a number of factors that create an environment which promotes the acquisition of translator authorizations solely for the purpose of selling them. First, we expect that a substantial portion of the remaining translator grants will be made pursuant to our settlement (*i.e.,* non-auction) procedures. Second, translator construction permits may be sold without any limitation on price. Third, permittees are not required to construct or operate newly authorized facilities before they can sell their authorizations. Collectively, these factors created an incentive for speculative filings and trafficking in translator authorizations. Such behavior damages the integrity of our licensing process, which assigns valuable spectrum rights to parties based on a system that gives priority to applications filed in one filing window over subsequent applications based on the assumption that the applications filed in the earlier window are filed in good faith by applicants that intend to construct and operate their proposed stations to serve the public. The history of the Auction 83 translator applications strongly supports our view that speculative applications delay the processing of *bona fide* applications, thereby impeding efforts to bring new service to the public. These speculative translator applications have also delayed the introduction of new LPFM service pursuant to our mandate under the LCRA to provide licensing opportunities for both LPFM and translator stations.

7. The extraordinarily high number of applications filed in the Auction 83 window, particularly by certain applicants (both nationally and in certain markets), and the significant number of authorized stations that were either assigned to another party or never constructed are strong indicia of applications filed for speculative purposes (either for potential sale or to game the auction system) rather than a good faith intent to construct and operate the proposed stations. Based on these concerns, we sought comment on whether a national cap of 50 or 75 applications would force filers with a large number of applications to concentrate on those proposals and markets where they have *bona fide* service plans. We also asked whether applicants should be limited to one or a few applications in a particular market, noting that such a restriction ''could limit substantially the opportunity to warehouse and traffic in translator authorizations while promoting diversity goals.''

8. The *Fourth R&O* concluded that both a national cap and a per-market cap for the 156 Appendix A markets were appropriate to limit speculative licensing conduct and necessary to bolster the integrity of the remaining Auction 83 licensing. We stated that non-feeable application procedures, flexible auction rules, and flexible translator settlement and transfer/assignment rules ''clearly have facilitated and encouraged the filing of speculative proposals * * *. While we recognize that high-volume filers did not violate our rules (''Rules''), these types of speculative filings are fundamentally at odds with the core Commission broadcast licensing policies and contrary to the public interest.''

9. The *Fourth R&O* rejected other potential anti-trafficking proposals offered by commenters, stating that application caps were the most administratively feasible solution for processing this large group of long-pending applications. We stated that we considered caps to be the only approach that would not only limit trafficking in translator authorizations but also fulfill our mandate under the LCRA to provide the fastest path to additional translator and LPFM licensing in areas where the need for additional service is greatest.

10. We adopted a national cap of 50 additional translators per applicant. We found that this cap, of itself, would affect no more than 20 of the approximately 646 total applicants in this group, and that this was a reasonable number of stations to construct and operate as proposed and would place restraints on trafficking of permits on the open market. We also noted that there was some agreement on such a limit even among translator advocates.

11. We also adopted a per-market cap of one application per market in the radio markets listed in Appendix A to the *Fourth R&O,* consisting of the top 150 Arbitron Metro markets (per the BIA Fall 2011 database, as defined in Appendix A) plus six additional markets where more than four translator applications are pending. We noted that some applicants had filed dozens of applications for a particular market, when it was inconceivable that a single entity would construct and operate so many stations there. We concluded that such applications were clearly filed for speculative reasons or to skew our auction procedures. Given the volume of pending applications, we found that it was administratively infeasible to conduct a case-by-case assessment of these applications to determine whether they could satisfy our rule limiting the grant of additional translator authorizations to a party that can make a ''showing of technical need for such additional stations'' (the ''Technical Need Rule''). Accordingly, we adopted a cap of one translator application per market in the Arbitron Metro markets listed in Appendix A to the *Fourth R&O.* For applications outside those markets, where only a small number of applications will require analysis, we decided to apply the Technical Need Rule on a case-by-case basis.

12. Appendix A to the *Fourth R&O* lists several ''embedded'' radio markets that are part of a larger market also listed in Appendix A: (1) Nassau-Suffolk (Long Island), NY (Arbitron Metro market #18, embedded in the New York Arbitron Metro market); (2) Hudson Valley, NY (Arbitron Metro market #39, partially embedded in the New York Arbitron Metro market); (3) Middlesex-Somerset-Union, NJ (Arbitron Metro market #41, embedded in the New York Arbitron Metro market); (4) Monmouth-Ocean, NJ (Arbitron Metro market #53, partially embedded in the New York Arbitron Metro market); (5) Morristown, NJ (Arbitron Metro market #117, embedded in the New York Arbitron Metro market); (6) Stamford-Norwalk, CT (Arbitron Metro market #148, embedded in the New York Arbitron Metro market); (7) San Jose, CA (Arbitron Metro market #37, embedded in the San Francisco Arbitron Metro market); (8) Santa Rosa, CA (Arbitron Metro market #121, embedded in the San Francisco Arbitron Metro market); and (9) Fredericksburg, VA (Arbitron Metro market #147, partially embedded in the Washington, DC Arbitron Metro market). The *Fourth R&O* stated that the one-per-market cap would apply to all

markets listed in Appendix A but did not explain how this cap would apply to the listed embedded markets.

13. In addition to those embedded markets, there are three more embedded markets that are not listed in Appendix A due to their smaller size: (1) New Bedford-Fall River, MA (Arbitron Metro market #180, embedded in the Providence-Warwick-Pawtucket, RI Arbitron Metro market); (2) Frederick, MD (Arbitron Metro market #195, embedded in the Washington, DC Arbitron Metro market); and (3) Manchester, NH (Arbitron Metro market #196, partially embedded in the Portsmouth-Dover-Rochester, NH Arbitron Metro market). The *Fourth R&O* did not explain whether applications filed in those embedded markets would be subject to the per-market cap imposed on the larger markets within which they are embedded.

2. Petitions for Reconsideration

14. Five petitions for reconsideration were filed following **Federal Register** publication of the *Fourth R&O.* Educational Media Foundation (''EMF'') filed a Petition for Reconsideration (''EMF Petition'') seeking reconsideration as to both the national cap of 50 applications and the per-market cap of one application. The remaining petitions only addressed the latter cap.

15. EMF currently has 292 pending translator applications from the Auction 83 window. EMF received 259 translator grants from that window before we froze the processing of such applications.

16. EMF first contends that the Commission must clarify the definition of the term ''radio market'' as used in the *Fourth R&O.* EMF argues that the term could mean census-designated urban areas, metropolitan statistical areas, Arbitron Metro markets, or some definition connected to the ''grids'' used in determining whether markets are ''spectrum limited'' or not. Additionally, EMF argues that both the national cap and the per-market cap are arbitrary and capricious. EMF argues that the Commission did not adequately explain the ''abusive'' licensing activity relating to Auction 83 filings and did not adequately explain why other ''more direct'' measures to combat speculation are not being used. EMF also argues that the Commission did not adequately explain how the caps square with the Commission's own conclusion that the LCRA requires it to make available licensing opportunities for both translators and LPFM stations ''in as many local communities as possible.''

17. Hope Christian Church of Marlton, Inc. (''Hope''), Bridgelight, LLC (''Bridgelight'') and Calvary Chapel of the Finger Lakes, Inc. (''CCFL'') (collectively, the ''Joint Petitioners'') filed a joint Petition for Partial Reconsideration (''Joint Petition'') seeking reconsideration to revise the one-per-market cap to include a waiver process. Hope is the licensee of WVBV(FM), Medford Lakes, NJ (Philadelphia, PA Arbitron Metro market); WWFP(FM), Brigantine, NJ (Atlantic City-Cape May, NJ Arbitron Metro market); and WZBL(FM), Barnegat Light, NJ (Monmouth-Ocean, NJ embedded market). Hope has 46 pending translator applications from the Auction 83 window, of which 45 are in Appendix A markets and one is outside the Appendix A markets. Hope received 21 translator grants before the processing freeze, primarily in the Philadelphia and Baltimore Arbitron Metro markets. Hope constructed all of those proposed stations. Bridgelight is the licensee of WRDR(FM), Freehold Township, NJ (Monmouth-Ocean, NJ embedded market); and WJUX(FM), Monticello, NY (outside the Appendix A markets). Bridgelight has 16 pending applications from the Auction 83 window. Bridgelight received five translator grants before the processing freeze (primarily in the New York Arbitron Metro market), but assigned all of them to other parties. CCFL is the licensee of WZXV(FM), Palmyra, NY (Rochester, NY Arbitron Metro market). CCFL has 16 pending translator applications from the Auction 83 window, of which eight are in Appendix A markets (five in the Buffalo, NY Arbitron Metro market and three in the Rochester, NY Arbitron Metro market). CCFL received 14 translator grants before the processing freeze (primarily in the Buffalo and Rochester Arbitron Metro markets), but assigned five of those to other parties and cancelled another one.

18. The Joint Petition maintains that the one-per-market cap unfairly harms local and regional applicants that have filed applications in a limited number of markets for the purpose of reaching distant communities in geographically large markets. The Joint Petition argues that the one-per-market cap should be supplemented with a waiver process that allows for waivers (with no limit on the number of authorizations in a market) under three conditions: (1) The 60 dBu contour of the translator application cannot overlap the 60 dBu contour of any commonly-controlled application; (2) the application would not preclude a future LPFM application in the grid for the Appendix A market or at the proposed transmitter site; and (3) the applicant agrees to accept a condition on the construction permit that disallows sale of the authorization for a period of four years after the station commences operation.

19. Conner Media, Inc. (together with the commonly-controlled Conner Media Corporation, ''Conner'') filed a Petition for Partial Reconsideration (''Conner Petition'') of the *Fourth R&O.* Conner is the licensee of WAVQ(AM), Jacksonville, NC (Greenville-New Bern-Jacksonville, NC Arbitron Metro market). Conner states that it filed translator applications in five different locations to serve the Greenville-New Bern-Jacksonville, NC Arbitron Metro market, which comprises ten diverse counties. Conner expresses interest in assigning additional permits from its pending applications to other AM broadcasters who would benefit from the nighttime service available on a translator. Conner argues that any local translator cap should be per-community, not per-market.

20. Western North Carolina Public Radio, Inc. (''WNC'') is the licensee of noncommercial educational (''NCE'') stations WCQS(FM), Asheville, NC; WFSQ(FM), Franklin, NC; and WYQS(FM), Mars Hill, NC (all in the Asheville, NC Arbitron Metro market). WNC filed a Petition for Reconsideration (''WNC Petition'') arguing that its Arbitron Metro market, Asheville, NC, should not be included in Appendix A or, alternatively, that the community of Black Mountain, NC, should not be considered part of that market because it is separated by a mountain range from Asheville and therefore requires its own translator service. WNC notes that Asheville is the 159th Arbitron Metro market, but was included in Appendix A because more than four translator applications are pending in that market.

21. Kyle Magrill (''Magrill'') filed a Petition for Reconsideration (''Magrill Petition''). Magrill is a translator applicant under the corporate name of CircuitWerkes, Inc. and the d/b/a name of CircuitWerkes. Magrill has seven pending translator applications from the Auction 83 window in four Appendix A markets in Florida. Magrill received three translator grants before the processing freeze took effect. Magrill argues that the Commission did not propose per-market caps in the *Third FNPRM,* but instead called for processing all translator applications in non-spectrum limited markets. Magrill argues that the number of translator sales has not been so high as to present a problem. Magrill notes that many

markets are geographically and ethnically diverse and also notes that HD channels have increased the need for multiple translators in certain locations. Magrill argues that the per-market cap particularly hurts local service providers who did not exceed the national cap. Magrill argues that the cap should be revisited and at least eased in markets that are not spectrum limited.

3. Responsive Pleadings

22. Prometheus Radio Project (''Prometheus'') filed an Opposition (''Prometheus Opposition'') to the petitions for reconsideration. Prometheus argues that the Commission properly defined the ''market'' for the one-per-market translator caps as the Arbitron Metro market. Prometheus rejects Magrill's claim about lack of notice, noting that the Commission specifically asked for comments on whether translator applicants should be limited to one or a few applications in any particular market and that this material was published in the **Federal Register**. Prometheus then argues that the caps will prevent speculation and preserve radio market diversity. Prometheus opposes any waiver process that would delay the LPFM application window.

23. REC Networks (''REC'') partially opposes the petitions for reconsideration. REC supports the national cap of 50 applications, but believes the per-market cap may be overly restrictive. REC argues for adoption of a waiver standard that is more stringent than the one proposed in the Joint Petition. REC suggests the following additional criteria: (1) The applicant must accept a condition on its construction permit that for a four-year period after commencing operations, the translator must be commonly owned with the primary station and must rebroadcast the primary analog output of that station; (2) the 60 dBu contour of the translator application must not overlap (i) a 30 kilometer radius around the center of markets 1–20, (ii) a 20 kilometer radius around the center of spectrum limited markets 21–50, or (iii) a 10 kilometer radius around the center of spectrum limited markets 51–100; and (3) applications grantable under this waiver must also comply with the national cap of 50 applications.

24. In reply comments, Conner, the Joint Petitioners and Magrill reiterate their prior positions. Four Rivers Community Broadcasting Corporation filed a reply arguing for a waiver standard similar to the standard suggested by the Joint Petition. One Ministries, Inc. and Life On The Way Communications, Inc. filed reply comments arguing for separation of embedded markets from the core market, particularly in the case of San Francisco, San Jose and Santa Rosa.

B. Discussion

25. For the reasons explained below, we will grant the petitions for reconsideration in part and clarify the treatment of translator applications in embedded markets. We will modify the national cap to allow each applicant to pursue up to 70 applications, provided that no more than 50 of them are in the Appendix A markets. We will also modify the per-market cap from one translator application per market to three, subject to two conditions: (1) To avoid dismissal under the cap procedures, the 60 dBu contour of a translator application may not overlap the 60 dBu contour of another translator application filed by that party or translator authorization held by that party as of the release date of this decision; and (2) the translator application may not preclude grant of a future LPFM application in the grid for that market or at the proposed out of grid transmitter site, in accordance with the processing policy delineated in the *Fourth R&O.* In all other respects, we deny the petitions.

1. Market Definitions

26. The *Fourth R&O* adopted ''both a national cap and a market-based cap for the markets identified in Appendix A.'' Appendix A contained a spreadsheet with eight top-level columns. Appendix A also contained a paragraph entitled ''Detailed Column Information'' for which the following information appeared in bold for the spreadsheet's first three top-level columns:

Arb#/Rank—Arbitron Market Ranking

CF#/Rank—Common Frequency Arbitron Market Ranking

Fall 2011 Arbitron Rankings—Arbitron Market Name

27. Appendix A made it clear that we were referring to Arbitron Metro markets rather than non-Arbitron data such as census data. Although we did not describe the markets as Arbitron Metro markets, the only alternative type of Arbitron radio market is an Arbitron Total Survey Area. Appendix A could not be interpreted to mean Arbitron Total Survey Area, however, because there is no Arbitron Total Survey Area for many of the markets listed in Appendix A, particularly the largest radio markets. Accordingly, contrary to EMF's claim, we do not believe there could reasonably have been any confusion over the fact that Appendix A refers to Arbitron Metro markets. In any event, we clarify here that the markets listed in Appendix A are Arbitron Metro markets.

28. EMF also argues that the *Fourth R&O* did not spell out how an application would be deemed to be within an Appendix A market. We disagree. Both the *Third FNPRM* and the *Fourth R&O* consistently referred to the proposed transmitter site as the determining factor for whether an application would be considered to be within a particular market. In fact, the *Third FNPRM* adopted a processing freeze on ''any translator modification application that proposes a transmitter site for the first time within any [spectrum-limited] market,'' while allowing any translator modification application ''which proposes to move its transmitter site from one location to another within the same spectrum-limited market.'' Our detailed market-specific translator processing policy adopted in the *Fourth R&O* specifically refers to the proposed transmitter site as the determining factor, and the translator cap discussion in the *Fourth R&O* likewise refers to proposed transmitter locations. In any event, we clarify here that a translator application is considered within an Arbitron Metro market for purposes of the per-market translator caps if it specifies a transmitter site within that Arbitron Metro market.

29. On the other hand, we agree that we should clarify the treatment of ''embedded'' markets. An embedded market is a unique marketing area for the buying and selling of radio air time. It is contained, either in whole or in part, within the boundaries of a larger ''parent'' market. Most, but not all, embedded markets are among the 156 radio markets listed in Appendix A.

30. Our intent was, and is, to treat each embedded market listed in Appendix A as a separate radio market for purposes of the per-market cap. For example, the San Francisco market (Arbitron Metro market #4) includes the San Jose (Arbitron Metro market #37) and Santa Rosa (Arbitron Metro market #122) embedded markets. Accordingly, the per-market cap would apply to each of three markets: (1) The core San Francisco market (consisting of Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo and Solano Counties); (2) the San Jose market (consisting of Santa Clara County); and (3) the Santa Rosa market (consisting of Sonoma County). Thus, an application for a translator in San Jose would not count against the per-market cap for that applicant in either the core San

Francisco market or the Santa Rosa market. Accordingly, subject to the processing rules described below, an applicant could prosecute three applications in each of those three markets. In contrast, the Washington, DC market (Arbitron Metro market #8) includes one county from the Fredericksburg, VA market (Arbitron Metro market #147, with Stafford County being the embedded portion of that market) and all of the Frederick, MD market (Arbitron Metro market #197). In that situation, an application proposing a site in Stafford County would be treated as an application in the Fredericksburg, VA Arbitron Metro market rather than an application in the Washington, DC Arbitron Metro Market. The per-market cap (as revised below) will apply to all applications proposing a site in the Fredericksburg, VA Arbitron Metro market, because that market is listed in Appendix A. On the other hand, an application proposing a site in Frederick County, MD would be treated as an application in the Frederick, MD Arbitron Metro market rather than the Washington, DC Arbitron Metro market. Because the Frederick, MD Arbitron Metro market is not listed in Appendix A, the per-market cap does not apply to any application proposing a site there. With the exclusion of Stafford County, VA and Frederick County, MD from the Washington, DC market for the purposes of the per-market cap, the cap for the Washington, DC market would apply only to applications proposing operation from a site in the core of that market, which is any part of the market other than those two counties.

2. Notice of Appendix A Per-Market Cap Proposal

31. We next address Magrill's claim that we violated the Administrative Procedure Act's notice and comment requirements by failing to give notice that the per-cap limit would apply to all Appendix A markets rather than just ''spectrum limited'' Appendix A markets. Magrill's comments focus on the Commission's market-specific translator dismissal process, with its distinction between ''spectrum limited'' markets and ''spectrum available'' markets, as delineated in Section III.B of the *Third FNPRM.* However, in Section III.C of the *Third FNPRM,* we then stated our tentative conclusion that this translator dismissal process would not be sufficient to address the problem of speculation among Auction 83 filers. We tentatively concluded that nothing in the LCRA limits the Commission from addressing such speculation through processing policies separate from the dismissal process discussed in Section III.B of the *Third FNPRM.* Based on those tentative conclusions, we asked for comments on processing policies to address the potential for speculative abuses among the remaining translator applications:

> For example, we seek comment on whether to establish an application cap for the applications that would remain pending in non-spectrum limited markets and unrated markets. Would a cap of 50 or 75 applications in a window force high filers to concentrate on those proposals and markets where they have bona fide service aspirations? In addition or alternatively, should applicants be limited to one or a few applications in any particular market?

32. Clearly, the point of Section III.C. of the *Third FNPRM* was to seek comments on potential national caps and per-market caps as a processing policy separate from the market-based translator dismissal policy discussed in Section III.B. We specifically noted that this processing policy could apply to applications in ''non-spectrum-limited'' markets and unrated markets. We received substantial comments on the proposals for a national cap and per-market caps. In fact, Magrill himself commented on the issue by proposing an alternative system that would limit applications in both ''spectrum available'' markets and ''spectrum limited'' markets based on the total number of applications filed nationally by a particular applicant. Accordingly, we reject Magrill's claim that we failed to give adequate notice that per-market caps might apply in ''spectrum available'' markets.

33. Similarly, the Joint Petition claims that a one-per-market cap on translator applications ''had never previously been proposed prior to the *Fourth R&O.''* The language quoted above from the *Third FNPRM* shows that this claim is unfounded. Accordingly, we reject this claim by the Joint Petitioners.

3. The National Cap of 50 Applications

34. EMF is the only party to challenge the national cap of 50 applications. As we noted above, EMF received 259 translator grants from its Auction 83 applications before our processing freeze took effect. Approximately 20 percent of those grants were never constructed and therefore were cancelled. Altogether, 72 out of EMF's 259 grants (almost 30 percent of those authorizations) were sold, were not built and therefore were cancelled, or were otherwise terminated.

35. EMF focuses its challenge to the national cap of 50 translator applications on two claims. First, EMF claims that the cap is based on an erroneous assumption that translator applicants with higher numbers of pending applications do not intend to construct all of those proposed stations. Second, EMF points out that the Commission chose a cap of 50 as the most ''administratively feasible solution for processing this large group of long-pending applications'' instead of ''more direct means'' of curbing speculation, such as limits on sales of new translator construction permits or the prices at which they can be sold.

36. EMF's first objection mischaracterizes our decision on the national cap by treating it as an unverified assumption about the number of stations that applicants could build or wish to build. We acknowledge that we cannot divine an applicant's intentions based on simple statistics, but that is not what we attempted to do. Rather, we developed a processing policy that would reasonably balance competing goals. The cap of 50 does not assume that an applicant could only intend to construct, or be able to construct, 50 new translator stations, but it will require applicants to prioritize their filings and focus on applications in those locations where they have a *bona fide* interest in providing service and on applications that are most likely to be grantable, while deferring their pursuit of other opportunities until a future filing window. In this regard, we reiterate that our conclusion here about speculative filings by high-volume applicants is supported by the data showing that an unusually large number of the translator grants from this filing window were not constructed or were assigned to a party other than the applicant. We believe applicants subject to the cap are likely to choose applications that (1) they expect to be granted, (2) they plan to construct and operate, and (3) will fill an unmet need, thereby improving competition and diversity. EMF has not shown that this expectation is unreasonable.

37. EMF's second argument overlooks many relevant considerations. First, EMF fails to note that most of the applicants subject to the cap received many grants before the processing freeze took effect. EMF itself received 259 grants, so for EMF the cap translates into 259 granted applications, plus as many additional applications that EMF selects that result in grants.

38. Second, as the Commission previously noted, future translator windows will provide additional new station licensing opportunities. With our flexible translator licensing standards, we expressed confidence that ''comparable licensing opportunities

will remain available in a future translator filing window'' with respect to applications dismissed pursuant to the application caps and our market-based processing policy.

39. Third, EMF overlooks our explicit balancing of ''the competing goals of deterring speculation and expanding translator service to new communities.'' In doing so, we selected the number of 50 applications to affect no more than 20 applicants, representing only three percent of the pool of Auction 83 applicants but approximately half of the pending applications. Thus, a national cap of 50 applications would allow 97 percent of applicants to prosecute all of their pending applications, and it will allow approximately 50 percent of all pending applications to be processed, while curbing the excessive number of applications filed by 3 percent of the filers.

40. With respect to the choice of an application cap over other options such as anti-trafficking rules, EMF claims erroneously that our objective was to limit the number of applications we had to process. We chose an application cap ''both [to] deter trafficking and provide the fastest path to additional translator and LPFM licensing in areas where the need for additional service is greatest.'' This approach benefits both translator and LPFM applicants and the public they seek to serve. An application cap provides an immediate solution to the trafficking issue and also ameliorates the impact of translator applications on LPFM service while avoiding the lead time necessary to develop and adopt new anti-trafficking rules or the resources needed to enforce such rules. This is why we described application caps as ''the most administratively feasible solution for processing this large group of long-pending applications.'' Advocates of anti-trafficking rules, such as EMF, have not shown that this conclusion is flawed.

41. We will, however, grant reconsideration with respect to the national cap of 50 applications in order to better ensure equitable distribution of radio service between urban and rural areas. We recognize that parties restricted to 50 applications will tend to choose applications in urban areas, because those applications offer potential service to the greatest number of people. We believe a modest relaxation of this restriction can provide additional service to rural areas without sacrificing the integrity of our licensing process or opportunities for new LPFM service. Accordingly, we will allow applicants to prosecute up to 70 applications nationally, provided that no more than 50 of those are in Appendix A markets. All selected applications outside the Appendix A markets must meet certain conditions. Specifically, the applications outside the Appendix A markets must (1) comply with the restriction against overlap with the applicant's other pending translator applications and authorizations set forth in paragraph 58 below with respect to the per-market cap, and (2) protect at least one channel for LPFM filing opportunities at the proposed transmitter site for each short form application specifying such site, as shown in the type of ''out of grid'' preclusion study described in paragraph 59 below with respect to the per-market cap. In addition, to ensure that these authorizations will not be relocated to Appendix A markets, we will impose a condition restricting their relocation. Specifically, during the first four years of operation, none of these authorizations can be moved to a site from which (calculated in accordance with Section 74.1204(b) of our Rules) there is no 60 dBu contour overlap with the 60 dBu contour proposed in the application as of the release date of this *Fifth Order on Reconsideration.* Our decision to establish a national cap is an exercise in line-drawing that is committed to agency discretion. Our choice of a limit of 70 applications nationally, with no more than 50 applications in the Appendix A markets, reasonably balances competing goals based on a careful evaluation of the record.

4. The Need for a Per-Market Cap

42. EMF characterizes the per-market cap as arbitrary and capricious. However, the record here clearly demonstrates that speculative translator filing activity was not only a national problem but also a local market problem. In the *Third FNPRM,* we described exactly this situation, noting that one applicant held 25 of the 27 translator applications proposing locations within 20 kilometers of Houston's center city coordinates and 75 applications in Texas. We also noted that two applicants held 66 of the 74 applications proposing service to the New York City Arbitron Metro market. EMF has not shown that our analysis as to speculative filings activity within Appendix A markets is incorrect.

43. *Non-top 150 Markets in Appendix A.* Appendix A to the *Fourth R&O* includes six non-top 150 markets, including Asheville, NC, because they have more than four translator applications pending. Such a large number of applications for markets outside the top 150 markets suggests speculative filing activity. Although WNC claims that it filed multiple applications to serve ''various clusters of communities'' in the Asheville market, it has not explained how its proposed service would achieve that result with respect to Black Mountain, NC, which is the focus of the WNC Petition. All of WNC's applications there specify Black Mountain as the community of license and, with only one exception, propose the same transmitter site. In addition, WNC fails to show any error in the Commission's analysis of the need to apply the market cap to those markets listed in Appendix A that are outside of the top 150 markets, or any valid justification for departing from Arbitron Metro market definitions. Arbitron Metro market definitions are based on multiple demographic/geographic factors, including terrain issues. Accordingly, we deny WNC's request to exclude Asheville, NC from Appendix A or in the alternative exclude the community of Black Mountain from the Asheville market.

44. *Proposed Alternative.* Conner argues that any local application cap on translators should be per-community, based on the number of service-restricted AM stations in any given community. Magrill similarly points out that there is increased demand for FM translators, both to rebroadcast AM stations and to rebroadcast HD radio streams. However, we have an obligation to address abusive application conduct, as described above, regardless of the supply/demand balance in the marketplace. In fact, trafficking in translator authorizations could only occur where there is demand, so the existence of such demand supports, rather than undercuts, our rationale for curbing speculation. With respect to Conner's suggested cap based on the proposed community of license rather than the Arbitron Metro market, this would be impractical from an administrative standpoint.

45. The record in this proceeding strongly supports a limit on translator applications within each Arbitron Metro market identified in Appendix A to protect the integrity of our licensing process. We recognize that EMF proposes anti-trafficking restrictions as an alternative approach, but our rationale for rejecting those restrictions in favor of a national cap applies equally to the per-market cap. Accordingly, we reject the claim that a per-market cap is arbitrary and capricious.

5. Revision of the Per-Market Cap

46. Based on the information presented in the reconsideration petitions and responsive pleadings, we conclude that an adjustment of the per-market cap will improve competition and diversity in the Appendix A markets without sacrificing LPFM filing opportunities or the policy objectives behind the per-market cap. As discussed below, we are increasing the per-market cap for radio markets identified in Appendix A of the *Fourth R&O* to allow up to three applications for each market, subject to certain conditions.

47. Although the petitioners do not challenge our conclusion that it is infeasible to apply the Technical Need Rule to the thousands of pending translator applications, they argue that one translator can only serve a small portion of most markets in Appendix A. The Joint Petition focuses on the Joint Petitioners' attempts to build regional networks of translators to rebroadcast the signals of their NCE stations. REC independently analyzed the applications of the Joint Petitioners and agrees that many of these applications propose operations very distant from the center of the Arbitron Metro market. REC agrees that, with appropriate limits, allowing such applications to be processed would improve diversity and competition in underserved areas, without impinging on LPFM filing opportunities.

48. We believe the Joint Petition and the REC Partial Opposition raise a valid point as to whether the one-per-market cap is overly restrictive. The Joint Petition states that the Joint Petitioners are prosecuting their pending translator applications not to speculate in translator permits or to manipulate the auction process, but in hopes of increasing the reach of their NCE stations. Based on its analysis of Joint Petitioners' applications, REC agrees that the Joint Petition demonstrates that the one-per-market cap is overly restrictive.

49. Prometheus urges that the one-per-market cap be retained as ''a crucial way to address the existing disparity'' between the number of authorized translators and the number of authorized LPFM stations. This argument appears to assume that any expansion in FM translator licensing will reduce opportunities for LPFM licensing. Clearly, that is not the case. With our market-based translator processing policy, as well as our national and per-market caps on translator applications, we have put strong limits in place to preserve LPFM filing opportunities. The expansion of the per-market cap will not reduce opportunities for LPFM licensing because, as we explain below, all translator applicants taking advantage of that change will need to protect LPFM filing opportunities when they do so. Our adjustment of the per-market cap in this order will not negatively affect LPFM licensing opportunities.

50. The Joint Petition proposes a waiver process under which the one-per-market cap would remain in place, but waivers would be available for applications meeting certain criteria: (1) The 60 dBu contour of the translator station would not overlap the 60 dBu contour of any commonly controlled application; (2) the application will not preclude the approval of a future LPFM application in the grid or at the proposed facility's transmitter site; and (3) the applicant agrees to accept a condition on its construction permit that disallows the for-profit sale of the authorization for four years after the station begins operation. REC agrees with these conditions, but proposes additional requirements: (1) The translator station, for four years after beginning operation, must be co-owned with the primary station and rebroadcast that station's primary analog signal; (2) the 60 dBu contour of the translator must not overlap the central core of the market; and (3) additional applications being prosecuted under this waiver would remain subject to the national cap.

51. We agree with certain elements of the Joint Petition and the REC Partial Opposition, but our revised per-market cap will vary in certain respects. First, we will not rely on an anti-trafficking condition. As we explained above, we believe such conditions are subject to circumvention, and monitoring compliance with an anti-trafficking condition would be unduly resource-intensive and could delay processing.

52. Second, we believe it is unnecessary to allow parties to prosecute a large number of translator applications within an Appendix A market, as would be possible under the waiver procedures advocated in the Joint Petition. As we have shown above, the Joint Petitioners and other applicants already have received a significant number of translator grants from the Auction 83 application process. Further, our clarification of embedded markets will help these parties prosecute more applications within embedded markets. As we have previously stated, we also expect that translator applicants will not be foreclosed from comparable application opportunities in the next translator filing window.

53. Based on our analysis of pending applications, we believe that a limit of three applications per applicant in the Appendix A markets is appropriate, subject to the conditions described below. With those conditions, we believe this relaxation in the per-market cap will improve diversity and competition in under-served areas of the Appendix A markets without precluding LPFM filing opportunities or increasing significantly the potential for licensing abuses.

54. The relaxed limit of three applications per market will only apply to an applicant that shows that its applications meet the conditions described in paragraphs 58–59. As we indicate below, we instruct the Media Bureau to issue a public notice asking any applicant that is subject to the national cap or the per-market cap to identify the applications they wish to prosecute consistent with the caps and to show that those applications comply with the caps. If a party has more than one application in an Appendix A market but fails to submit a showing pursuant to the public notice, or submits a deficient showing, we will not analyze their applications independently to assess whether they comply with the conditions that there be no 60 dBu overlap with that party's other applications or authorizations and that there be no preclusion of LPFM filing opportunities. Accordingly, in those situations we will process only the first filed application for that party in that market.

55. In deciding on an adjustment to the per-market cap, we are balancing the competing interests of adding new service to underserved areas by translators versus preserving the integrity of our licensing process by dismissing applications filed for speculative reasons or to skew our auction procedures. The factors cited by the petitioners and REC, particularly the limited service area of a translator compared to the size of the Appendix A markets, weigh in favor of allowing more than one translator application in an Appendix A market, provided that each translator would serve a different part of the market than any of an applicant's existing translators or other pending translator applications. On the other hand, the abusive filing conduct described above, combined with the considerations set forth in paragraph 52, suggest that any relaxation be limited to a small number of applications per Appendix A market. In addition, the need to protect LPFM filing opportunities, for the reasons delineated in the *Fourth R&O,* supports a condition that none of the Appendix A translator

applications would preclude an LPFM filing opportunity. We conclude that a limited relaxation of the per-market cap, combined with conditions that will protect LPFM filing opportunities and prevent duplicative translator service areas, would promote competition and diversity in Appendix A markets by expanding translator service to underserved areas without threatening the integrity of our licensing process or precluding LPFM filing opportunities. Thus, we believe that the benefits of our action will outweigh any potential costs.

56. In considering the change in the per-market cap, we analyzed applicants with 1–5 pending applications per market in all Arbitron-rated markets. In doing so, we have not taken certain variables into account because it was not feasible to do so. Those variables are the impact of the national cap on the number of pending applications and the impact of the two conditions proposed in connection with an adjustment of the one-per-market cap. The cap of one would affect two-thirds of those applicants, whereas a cap of three would affect less than one-third of those applicants, meaning that a substantial majority of applicants could prosecute all of their pending applications. Thus, relaxation of the cap from one to three applications per market could benefit a significant number of translator applicants who do not have an excessive number of applications pending in any market (*i.e.,* more than five). However, as indicated above and in the Joint Petition and the REC Partial Opposition, any such relaxation should be subject to certain conditions to preserve LPFM filing opportunities and the integrity of our licensing process.

57. With respect to the Joint Petitioners' proposal to prohibit 60 dBu overlap between commonly-controlled applications, we generally agree that this is an appropriate condition. For the reasons shown above, we believe that multiple translator applications in a single area suggest an attempt to game the auction system or to obtain permits for the purpose of selling them. Such a restriction also would advance the goal of the Technical Need Rule to limit the licensing of multiple translators serving the same area to a single licensee. As we have explained, attempting a case-by-case analysis of the thousands of pending translator applications for compliance with that rule is not feasible.

58. For these reasons, we adopt the following processing policies: The protected (60 dBu) contour (calculated in accordance with Section 74.1204(b) of our Rules) of the proposed translator station may not overlap the protected (60 dBu) contour (also calculated in accordance with Section 74.1204(b) of our Rules) of any other translator application filed by that applicant or translator authorization held by that applicant, as of the date of the release of this *Fifth Order on Reconsideration.* Because our goal is to expedite the processing of applications, we will not accept an alternative contour prediction method study to establish lack of 60 dBu contour overlap. The concern we have about service duplication applies even more strongly when a party already has an existing translator station providing service to the same area proposed by that party in an application. Accordingly, we are expanding the proposed condition to include outstanding authorizations as well as applications. However, we will not extend this condition to limit applications based on parties' attributable interests or common control of applicant and licensee entities. The pending Auction 83 applications lack any information about parties to the applications, and so we lack sufficient information to make determinations about attributable interests in other applications or common control of applicant entities. Asking applicants to amend their applications to provide this information would delay our efforts to ensure expeditious processing of translator and LPFM applications, and resolving disputes over whether an application is commonly controlled with another application or authorization would further delay this effort. Accordingly, consistent with the approach taken in the *Fourth R&O,* we are limiting this condition to applications filed by and authorizations issued to the named applicant entity.

59. We agree with the condition advocated by the Joint Petitioners and REC that the proposed translator station cannot preclude approval of a future LPFM application in the grid for that market, under the processing policy delineated in Section II.B of the *Fourth R&O,* or at the proposed out of grid transmitter site. To satisfy this condition, applicants must submit an LPFM preclusion study demonstrating that grant of the proposed translator station will not preclude approval of a future LPFM application. As we explained in the *Fourth R&O,* one of our broad principles for implementation of the LCRA is that our primary focus under Section 5(1) must be to ensure that translator licensing procedures do not foreclose or unduly limit future LPFM licensing, because the more flexible translator licensing standards will make it much easier to license new translator stations in the future. This condition is consistent with that broad principle.

60. Under the procedure proposed in the Joint Petition and the REC Partial Opposition, compliance with the conditions described above would not be required for an applicant's first translator application in an Appendix A market, but instead would only be required as part of a showing for additional applications in that market. We believe, however, that it is appropriate to impose these conditions on all of the applications if a party chooses to prosecute more than one application in an Appendix A market so that translator applicants will have an incentive to provide more service to underserved areas of the Appendix A markets.

61. If a party instead elects to prosecute only one application in an Appendix A market, then it need not make a showing that the application complies with the conditions described in paragraphs 58 and 59 when the local cap compliance showings are submitted. (However, if a party prosecutes only one application and it proposes substantial overlap with an existing translator authorization held by that party, the Technical Need Rule and FCC Form 349 will require the party to show a technical need for the second translator when the Form 349 application is due in order to justify a grant of that application.) We are providing this flexibility so that the revised policy is not more restrictive than the original one-per-market cap for any translator applicant. We note that none of the petitions for reconsideration or responsive pleadings argue that the one-per-market policy should be tightened through the imposition of conditions on a single application.

62. REC also proposes that applications grantable under the relaxed per-market standard be subject to the national cap of 50 applications adopted in the *Fourth R&O.* We agree that the national cap should be uniform for all applicants. The relaxation of the per-market cap leaves undisturbed an applicant's obligation to comply with the national cap of 70 applications, with no more than 50 applications in Appendix A markets.

63. With the cap of three-per-market in place, we find it unnecessary to adopt the additional waiver conditions suggested by REC. The principal conditions suggested by REC would not preserve LPFM filing opportunities or, in our opinion, curb speculation by translator applicants. We also believe they would constrain competition in

Appendix A markets without any countervailing public benefit.

64. REC's first additional waiver requirement would not allow more than one translator application to be prosecuted within certain geographic zones around the center of the Appendix A markets. However, we have already adopted a rigorous processing standard for pending translator applications in Appendix A markets, and REC has not shown that this additional constraint is needed. We believe this restriction would limit competition in the Appendix A markets without providing a countervailing benefit. REC's proposal also could be circumvented by modifications to construction permits.

65. REC's second additional waiver requirement would impose a condition on the construction permit that, for four years after beginning operation, the translator must be commonly-owned with the primary station and must rebroadcast that station's primary analog signal. REC claims that this condition is appropriate because translator permittees in some markets have entered into time brokerage deals with commercial broadcasters to air HD radio programming streams on NCE translator stations. We view REC's proposed condition as more of a programming preference than an effort to curb speculation. We also believe diversity and competition would be better served by giving translator applicants the flexibility to prosecute applications that meet the revised per-market application cap described above. We expect those parties to prosecute the applications that are most likely to be granted and most likely to provide a needed service without precluding a future LPFM filing opportunity. Moreover, as indicated above with respect to the Joint Petition's proposed anti-trafficking condition, enforcement of REC's proposed condition and processing waiver requests would be unduly resource-intensive and could delay the processing of applications.

66. As we indicated in the *Fourth R&O,* the burden will be on each applicant to demonstrate compliance with the national and per-market application caps. Any party with (1) more than 70 applications pending nationally, (2) more than 50 applications pending in Appendix A markets, and/or (3) more than one pending application in any of the markets identified in Appendix A (subject to the clarification above as to embedded markets) will be required by a forthcoming public notice to identify and affirm their continuing interest in those pending applications for which they seek further Commission processing, consistent first with the national cap, as revised in paragraph 41 above, and then with the revised per-market cap of three applications. They will also be required to demonstrate that the selected applications meet the conditions described in (1) paragraph 41 above with respect to applications outside the Appendix A markets for purposes of the national cap of 70 applications, and (2) paragraphs 58 and 59 above if they elect to prosecute more than one application in an Appendix A market.

67. The *Fourth R&O* described certain translator amendment opportunities in connection with the market-based processing policy. However, the application caps we describe here will be applied before any such amendment opportunity is available. This approach is consistent with our prior approach in the *Third Report and Order.* This approach also will expedite our processing of the large volume of translator applications, which needs to be done before we can open an LPFM filing window.

68. Both pending long form and short form applications will be subject to these applicant-based caps. In the event that an applicant does not timely comply with these dismissal procedures or submits a deficient showing, we direct the staff to (1) first apply the national cap, retaining on file the first 70 filed applications and dismissing (a) those Appendix A applications within that group of 70 applications that were filed after the first 50 Appendix A applications, and (b) those applications outside the Appendix A markets for which an adequate showing pursuant to paragraph 41 has not been submitted, and (2) then dismiss all but the first filed application by that applicant in each of the markets identified in Appendix A. We believe that this process will give applicants an incentive to file timely and complete showings so that they can maximize their future service to the public procedural matters

C. Fifth Order on Reconsideration

69. *Supplemental Final Regulatory Flexibility Analysis.* Appendix A contains a supplemental final regulatory flexibility analysis pursuant to the Regulatory Flexibility Act of 1980, as amended (''RFA'').

70. *Congressional Review Act.* The Commission will send a copy of this *Fifth Order on Reconsideration* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

III. Ordering Clauses

A. Fifth Order on Reconsideration

71. Accordingly, *it is ordered* that the Petition for Partial Reconsideration filed by Hope Christian Church of Marlton, Inc., Bridgelight, LLC and Calvary Chapel of the Finger Lakes, Inc. on May 8, 2012, the Petition for Reconsideration of Educational Media Foundation on Fourth R&O and Third Order on Reconsideration on May 8, 2012, the Petition for Partial Reconsideration of Fourth R&O and Third Order on Reconsideration filed by Conner Media, Inc. on May 9, 2012, the Comments of Kyle Magrill and Petition for Reconsideration filed by Kyle Magrill on May 7, 2012, and the Petition for Reconsideration filed by Western North Carolina Public Radio, Inc. on May 8, 2012, *are granted in part* to extent set forth above and otherwise denied.

72. *It is further ordered* that the Reply of Four Rivers Community Broadcasting Corporation to Oppositions to Petitions for Reconsideration *is dismissed* to the extent set forth above.

73. *It is further ordered* that pursuant to pursuant to the authority contained in sections 4(i), 301, 302, 303(e), 303(f) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 301, 302, 303(e), 303(f) and 303(r), and the Local Community Radio Act of 2010, Pub. L. No. 111–371, 124 Stat. 4072 (2011), the *Fifth Order on Reconsideration* is hereby *adopted,* effective January 10, 2013.

74. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of the *Fifth Order on Reconsideration,* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2012–29877 Filed 12–10–12; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket Nos. 120709225–2365–01 and 100812345–2142–03]

RIN 0648–XC367

Snapper-Grouper Fishery of the South Atlantic; Reopening of the Commercial Harvest of Red Snapper and Gray Triggerfish in the South Atlantic

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; reopening.

SUMMARY: NMFS reopens the 2012 commercial sector for red snapper and gray triggerfish in the South Atlantic exclusive economic zone (EEZ). NMFS previously determined the commercial annual catch limits (ACLs) for gray triggerfish and red snapper had been reached, and closed the commercial sector for gray triggerfish at 12:01 a.m., local time, on September 11, 2012 and the commercial sector for red snapper at 12:01 a.m., local time, on November 21, 2012. However, updated landings estimates indicate the commercial ACLs for red snapper and gray triggerfish have not been reached at this time. Therefore, NMFS is reopening the commercial sector for red snapper and gray triggerfish in the South Atlantic at 12:01 a.m., on December 12, 2012. These species will remain open until 12:01 a.m. on December 19, 2012. The intended effect of this temporary rule is to maximize harvest benefits for commercial red snapper and gray triggerfish fishermen. Additionally, this reopening for red snapper provides an opportunity to collect fishery-dependent data that could be useful for the 2014 red snapper stock assessment.

DATES: This temporary rule is effective 12:01 a.m., local time, December 12, 2012, until 12:01 a.m., local time, December 19, 2012.

FOR FURTHER INFORMATION CONTACT: Catherine Hayslip, telephone: 727–824–5305, or email: *catherine.hayslip@noaa.gov.*

SUPPLEMENTARY INFORMATION: NMFS and the South Atlantic Fishery Management Council (Council) manage South Atlantic snapper-grouper including red snapper and gray triggerfish under the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP). The Council prepared the FMP and NMFS implements the FMP through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

Background

Red Snapper

NMFS implemented emergency rulemaking to allow for the limited harvest and possession of red snapper in or from the South Atlantic EEZ in 2012 (77 FR 51939, August 28, 2012). Through the emergency rule, NMFS implemented an ACL of 20,818 lb (9,443 kg), gutted weight, for the commercial sector. A commercial trip limit of 50 lb (22.7-kg), gutted weight, no size limit, and a 7-day commercial fishing season were implemented to constrain harvest to the ACL. The commercial fishing season opened at 12:01 a.m., local time, September 17, 2012, and closed at 12:01 a.m., local time, September 24, 2012. The Southeast Fisheries Science Center (SEFSC) monitored commercial landings during the 7-day season to determine whether the commercial ACL had been harvested. The AMs specified in 50 CFR 622.49(b)(25)(i) state that if the SEFSC determines the ACL has not been harvested during the 7-day season, the Regional Administrator may reopen the commercial sector for an additional limited time. The SEFSC determined that the ACL was not harvested during the first 7-day season, therefore, NMFS published a temporary rule on November 15, 2012 (77 FR 68071), and reopened the commercial sector for red snapper at 12:01 a.m., on November 13, 2012, and closed it at 12:01 a.m., on November 21, 2012. However, the SEFSC determined that the ACL was not harvested during the November reopening, therefore, NMFS is reopening the commercial sector for red snapper at 12:01 a.m., on December 12, 2012, and closing it at 12:01 a.m., on December 19, 2012. During the reopening, harvest will again be limited to the 50-lb (22.7-kg), gutted weight, daily trip limit and there will be no size limit.

After the commercial sector closes, an operator of a vessel with a valid commercial vessel permit for South Atlantic snapper-grouper having red snapper onboard must have landed and bartered, traded or sold such red snapper prior to 12:01 a.m., local time, December 19, 2012. During the closure, all sale or purchase of red snapper is prohibited and, because the recreational sector is also closed, the bag and possession limit of red snapper is zero. This bag and possession limit and the prohibition on sale/purchase apply in the South Atlantic on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.,* in state or Federal waters. The prohibition on sale or purchase does not apply to the sale or purchase of red snapper that were harvested, landed ashore, and sold prior to 12:01 a.m., local time, December 19, 2012, and were held in cold storage by a dealer or processor.

Gray Triggerfish

NMFS determined that the commercial ACL of 305,262 lb (138,465 kg), round weight, for gray triggerfish was reached and published a temporary rule on September 4, 2012 (77 FR 53776), to close gray triggerfish on September 11, 2012. However, since that closure, the SEFSC has received additional landings data and has determined that the ACL was not harvested prior to September 11, 2012. Therefore, in accordance with 50 CFR 622.43(c), NMFS is reopening the commercial sector for gray triggerfish beginning at 12:01 a.m., on December 12, 2012, and closing at 12:01 a.m., on December 19, 2012.

After the commercial sector closes, all sale or purchase of gray triggerfish is prohibited and harvest or possession of gray triggerfish in or from the South Atlantic EEZ is limited to the bag and possession limit, as specified at 50 CFR 622.39(d)(1) and (d)(2). During the closure, the bag and possession limits and the prohibition on sale/purchase apply in the South Atlantic on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where the fish were harvested, *i.e.,* in state or Federal waters. The commercial sector for gray triggerfish will reopen on January 1, 2013, the beginning of the 2013 commercial fishing season.

Classification

The Regional Administrator, Southeast Region, NMFS, has determined this temporary rule is necessary for the conservation and management of South Atlantic red snapper and gray triggerfish and is consistent with the Magnuson-Stevens Act and other applicable laws.

This action is taken under 50 CFR 622.49(b)(25)(i) and 50 CFR 622.43(c) and is exempt from review under Executive Order 12866.

These measures are exempt from the procedures of the Regulatory Flexibility Act because the temporary rule is issued

without opportunity for prior notice and comment.

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive the requirements to provide prior notice and the opportunity for public comment on this temporary rule. Such procedures are unnecessary and contrary to the public interest regarding red snapper because the commercial ACL and AMs for red snapper were established in emergency rulemaking to allow for the limited harvest and possession of red snapper in 2012 (77 FR 51939, August 28, 2012), and the AMs allow the Regional Administrator to reopen the commercial sector if the ACL has been determined to have not been reached during the first 7-day commercial season. NMFS previously determined the commercial ACL for red snapper would be reached by November 21, 2012, and closed the commercial sector for red snapper in the South Atlantic at 12:01 a.m., local time, on November 21, 2012. However, updated landings estimates indicate the commercial ACL for red snapper has not been reached at this time, and therefore additional harvest is available in order to achieve optimum yield. Such procedures are unnecessary and contrary to the public interest regarding gray triggerfish because NMFS previously determined the commercial ACL for gray triggerfish would be reached by September 11, 2012, and therefore, closed the commercial sector for gray triggerfish in the South Atlantic at 12:01 a.m., local time, on September 11, 2012. However, updated landings estimates indicate the commercial ACL for gray triggerfish has not been reached at this time, and therefore additional harvest is available in order to achieve optimum yield. All that remains is to notify the public that additional harvest is available under the established ACLs and, therefore, the commercial sector for red snapper and gray triggerfish will reopen.

Additionally, reopening the commercial sector for red snapper and gray triggerfish will likely result in revenue increases to commercial vessels. Fishermen will be able to keep the red snapper and gray triggerfish that they are currently required to discard. Additionally, reopening the commercial sector for red snapper will provide an opportunity to collect fishery-dependent data that will likely be useful for the 2014 red snapper stock assessment. Delaying the implementation of this rulemaking to provide prior notice and the opportunity for public comment would reduce the likelihood of reopening the commercial sector for red snapper and gray triggerfish in the 2012 fishing year.

For the aforementioned reasons, the AA also finds good cause to waive the 30-day delay in the effectiveness of this action under 5 U.S.C. 553(d)(3).

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 6, 2012.

Emily H. Menashes,

Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2012–29878 Filed 12–6–12; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 111220786–1781–01]

RIN 0648–XC373

Fisheries of the Northeastern United States; Summer Flounder Fishery; Quota Transfer

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; quota transfer.

SUMMARY: NMFS announces that the State of Maine is transferring a portion of its 2012 commercial summer flounder quota to the State of Connecticut. NMFS is adjusting the quotas and announcing the revised commercial quota for each state involved.

DATES: Effective December 6, 2012, through December 31, 2012.

FOR FURTHER INFORMATION CONTACT: Carly Bari, Fishery Management Specialist, 978–281–9224.

SUPPLEMENTARY INFORMATION: Regulations governing the summer flounder fishery are in 50 CFR part 648, and require annual specification of a commercial quota that is apportioned among the coastal states from North Carolina through Maine. The process to set the annual commercial quota and the percent allocated to each state are described in § 648.100.

The final rule implementing Amendment 5 to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan, which was published on December 17, 1993 (58 FR 65936), provided a mechanism for summer flounder quota to be transferred from one state to another. Two or more states, under mutual agreement and with the concurrence of the Administrator, Northeast Region, NMFS (Regional Administrator), can transfer or combine summer flounder commercial quota under § 648.102(c)(2). The Regional Administrator is required to consider the criteria in § 648.102(c)(2)(i) to evaluate requests for quota transfers or combinations.

Maine has agreed to transfer 6,000 lb (2,721 kg) of its 2012 commercial quota to Connecticut. This transfer was prompted by the diligent efforts of state officials in Connecticut not to exceed the commercial summer flounder quota. The Regional Administrator has determined that the criteria set forth in § 648.102(c)(2)(i) have been met. The revised summer flounder quotas for calendar year 2012 are: Maine, 54 lb (24 kg); and Connecticut, 293,320 lb (133,048 kg).

Classification

This action is taken under 50 CFR part 648 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 5, 2012.

Emily H. Menashes,

Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2012–29876 Filed 12–6–12; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 77, No. 238
Tuesday, December 11, 2012

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1131; Directorate Identifier 2012–NE–34–AD]

RIN 2120–AA64

Airworthiness Directives; Turbomeca S.A. Turboshaft Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Turbomeca S.A. Arriel 1A1, 1A2, 1B, 1C, 1C1, 1C2, 1D, 1D1, 1E2, 1K1, 1S, and 1S1 turboshaft engines. This proposed AD was prompted by a finding that the engine's tachometer unit cycle counting feature is unreliable. This proposed AD would require daily post-flight checks of the engine tachometer's unit cycle counting feature. This proposed AD would also require ground-run functional checks within every 1,000 operating hours. This proposed AD was prompted by detailed analysis and review of the accuracy of the engine's tachometer cycle counting feature. We are proposing this AD to prevent uncontained engine failure and damage to the helicopter.

DATES: We must receive comments on this proposed AD by February 11, 2013.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.

For service information identified in this proposed AD, contact Turbomeca S.A., 40220 Tarnos, France; phone: 33 (0) 5 59 74 40 00; telex: 570 042; fax: 33 (0) 5 59 74 45 15. You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received and other information. The street address for the Docket Operations office (phone: 800–647–5527) is the same as the Mail address provided in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Sanjana Murthy, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7750; fax: 781–238–7199; email: *sanjana.murthy@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–1131; Directorate Identifier 2012–NE–34–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of the Web site, anyone can find and read the comments in any of our dockets, including, if provided, the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA AD 2012–0187, dated September 18, 2012 (referred to hereinafter as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> Following detailed analysis and review of in-service feedback performed by Turbomeca on the Arriel 1 engines, the chapter 05–10 Airworthiness Limitation Section (ALS) of Arriel 1 Maintenance Manuals has been updated in order to clarify the definition and update the requirements relative to the cycle counting aid system (modification introduced in production by Turbomeca modification TU207 or TU243 and in-service, respectively, by Turbomeca Service Bulletin (SB) 292 80 0190 or SB 292 80 0168), add associated maintenance tasks, and modify the Power Turbine (PT) partial cycle counting method.

The SBs referenced above introduced the tachometer. The tachometer's cycle counting feature, in some instances, produced results inconsistent with ground run checks. The inaccurate cycle counting results of the tachometer can lead to exceeding life limits on critical rotating parts, which can cause uncontained engine failure. Further information may be obtained by examining the MCAI in the AD docket.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of France and is approved for operation in the United States. Pursuant to our bilateral agreement with the European Community, EASA has notified us of the unsafe condition described in the MCAI referenced above. We are proposing this AD because we evaluated all information provided by EASA and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design. This proposed AD would require daily post-flight checks of the engine tachometer's unit cycle counting feature. This

proposed AD would also require ground-run functional checks within every 1,000 operating hours.

Costs of Compliance

We estimate that this proposed AD would affect about 1,420 engines installed in helicopters of U.S. registry. We also estimate that it would take about 30 minutes per engine to perform a check of the engine's tachometer unit cycle counting feature and that an average of 320 checks would be required per year. Based on the average annual operating hours for an engine, a 1,000 operating hour functional check would not be required for at least one year. The average labor rate is $85 per hour. No parts would be required. Based on these figures, we estimate the average total cost of the proposed AD on U.S. operators to perform checks of the tachometer cycle counting unit for a year, is $19,312,000.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Turbomeca S.A.: Docket No. FAA–2012–1131; Directorate Identifier 2012–NE–34–AD.

(a) Comments Due Date

We must receive comments by February 11, 2013.

(b) Affected Airworthiness Directives (ADs)

None.

(c) Applicability

This AD applies to Turbomeca S.A. Arriel 1A1, 1A2, 1B, 1C, 1C1, 1C2, 1D, 1D1, 1E2, 1K1, 1S, and 1S1 turboshaft engines that have incorporated Modification TU 207 or TU 243, or have incorporated Turbomeca Service Bulletin (SB) No. 292 80 0168 or SB No. 292 80 0190.

(d) Reason

This AD was prompted by detailed analysis and review of the accuracy of the engine's tachometer cycle counting feature. We are issuing this AD to prevent uncontained engine failure and damage to the helicopter.

(e) Actions and Compliance

(1) During the post flight maintenance inspection after the last flight of each day, compare the cycles counted by the engine's tachometer unit with the cycles counted by the primary counting method.

(2) If the numbers are different, use the primary counting method thereafter to determine all cycle counts. Do not use the values from the tachometer unit cycle counting feature.

(3) If the engine tachometer cycle counting feature remains accurate, then every 1,000 operating hours, perform a ground-run functional check of the tachometer unit cycle counting feature. If the counting feature fails the check, thereafter use only the primary cycle counting method to count cycles.

(4) If the tachometer is replaced, follow instructions in paragraphs (e)(1), (e)(2), and (e)(3) of this AD.

(f) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, may approve AMOCs for this AD. Use the procedures found in 14 CFR 39.19 to make your request.

(g) Related Information

(1) For more information about this AD, contact Sanjana Murthy, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7750; fax: 781–238–7199; email: *sanjana.murthy@faa.gov.*

(2) Refer to European Aviation Safety Agency AD 2012–0187, dated September 18, 2012, and Turbomeca S.A. Service Bulletin (SB) No. 292 80 0168 and SB No. 292 80 0190, for related information.

(3) For service information identified in this AD, contact Turbomeca S.A., 40220 Tarnos, France; phone: 33 (0) 5 59 74 40 00; telex: 570 042; fax: 33 (0) 5 59 74 45 15. You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

Issued in Burlington, Massachusetts, on December 3, 2012.

Colleen M. D'Alessandro,

Assistant Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2012–29871 Filed 12–10–12; 8:45 am]

BILLING CODE 4910–13–P

COURT SERVICES AND OFFENDER SUPERVISION AGENCY FOR THE DISTRICT OF COLUMBIA

28 CFR Part 811

RIN 3225–AA10

Sex Offender Registration Amendments

AGENCY: Court Services and Offender Supervision Agency for the District of Columbia.

ACTION: Proposed rule.

SUMMARY: The Court Services and Offender Supervision Agency for the District of Columbia (''CSOSA'') is issuing a proposed rule to amend its current rule that sets forth procedures and requirements relating to periodic verification of registration information for sex offenders. The proposed rule, if finalized, would permit CSOSA to verify addresses of sex offenders by conducting home visits on its own accord and with its law enforcement

partners. The proposed rule, if adopted, would also clarify the schedule for verifying home addresses, even for those sex offenders who are required to register but are not under CSOSA's supervision.

DATES: Submit comments on or before February 11, 2013. All comments, including attachments and other supporting materials, will be part of the public record and will be subject to public disclosure. Sensitive personal information such as social security numbers should not be included with your comments.

ADDRESSES: Submit comments to Office of the General Counsel, CSOSA, 633 Indiana Avenue, NW., Room 1380, Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: Rorey Smith, Deputy General Counsel, (202) 220–5797, or *rorey.smith@csosa.gov*. Questions about this publication are welcome, but inquiries concerning individual cases cannot be answered over the telephone.

SUPPLEMENTARY INFORMATION:

I. Background

CSOSA is responsible under the District of Columbia Sex Offender Registration Act of 1999, DC Law 13–137, DC Official Code Sections 22–4001 *et seq.,* for carrying out the sex offender registration functions in the District of Columbia, including verification of information maintained on sex offenders. In addition, the Sex Offender Registration and Notification Act (SORNA), Title I of the Adam Walsh Child Protection and Safety Act of 2006, (Pub. L. 109–248), provides a comprehensive set of minimum standards for sex offender registration and notification in the United States. SORNA is designed to strengthen and increase the effectiveness of sex offender registration and notification for the protection of the public and to reduce the risk that sex offenders could evade registration requirements or the consequences of registration violations. This amendment will allow CSOSA to better meet the requirements of the District of Columbia Sex Offender Registration Act of 1999 and SORNA.

II. Statutory Authority

The District of Columbia Sex Offender Registration Act of 1999

The District of Columbia Sex Offender Registration Act of 1999, DC Law 13–137, DC Official Code Sections 22–4001 *et seq.,* grants CSOSA the authority to adopt and implement procedures and requirements for verification of address information and other information required for registration.

The Sex Offender Registration and Notification Act (SORNA)

The Sex Offender Registration and Notification Act (SORNA), Title I of the Adam Walsh Child Protection and Safety Act of 2006, (Pub. L. 109–248), requires a sex offender to appear in person, allowing the jurisdiction to take a current photograph and verify the information in the sex offender registry on a scheduled frequency. Jurisdictions may require verification of registration information with greater frequency than that required by SORNA and may wish to include in their systems additional means of verification for registration information, such as mailing address verification forms to the registered residence address, requesting that the sex offender to sign and return a verification form, crosschecking information provided by the sex offender for inclusion in the registry against other records systems, and verifying home addresses through home visits.

Jurisdictions are required to notify appropriate law enforcement agencies of failures by sex offenders to comply with registration requirements, and such registration violations must be reflected in the sex offender registry. SORNA requires that jurisdictions and the appropriate law enforcement agencies take any appropriate action to ensure compliance. Federal law enforcement resources, including those of the United States Marshals Service, are permitted to assist jurisdictions in locating and apprehending sex offenders who violate registration requirements.

III. Request for Comments

CSOSA invites comments to address its proposed rule amending its existing rule, permitting CSOSA to: (1) Verify addresses of sex offenders by conducting home visits on its own accord and with its law enforcement partners, and (2) clarify the schedule for verifying home addresses, even for those sex offenders who are required to register but are not under CSOSA's supervision.

IV. Matters of Regulatory Procedure

Executive Order 12866

CSOSA has determined that this proposed rule is not a significant rule within the meaning of Executive Order 12866.

Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Under Executive Order 13132, this rule does not have sufficient federalism implications requiring a Federalism Assessment.

Regulatory Flexibility Act

The proposed rule will not have a significant economic impact upon a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 605(b).

Unfunded Mandates Reform Act of 1995

The rules will not cause State, local, or tribal governments, or the private sector, to spend $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. No action under the Unfunded Mandates Reform Act of 1995 is necessary.

Small Business Regulatory Enforcement Fairness Act of 1996 (Subtitle E–Congressional Review Act)

These rules are not ''major rules'' as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 Subtitle E–Congressional Review Act), now codified at 5 U.S.C. 804(2). The rules will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on the ability of United States-based companies to compete with foreign-based companies. Moreover, these are rules of agency practice or procedure that do not substantially affect the rights or obligations of non-agency parties, and do not come within the meaning of the term ''rule'' as used in Section 804(3)(C), now codified at 5 U.S.C. 804(3)(C). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

List of Subjects in 28 CFR Part 811

Probation and parole.

For the reasons set forth in the preamble, the Court Services and Offender Supervision Agency for the District of Columbia proposes to amend 28 CFR Part 811 as follows:

PART 811 [AMENDED]

1. The authority citation for 28 CFR part 811 is revised to read as follows:

Authority: DC ST § 24–133 and the District of Columbia Sex Offender Registration Act of 1999, DC Law 13–137.

2. In § 811.9, revise paragraph (c) and add paragraph (e) to read as follows:

§ 811.9 Periodic verification of registration information.

* * * * *

(c) Quarterly or annually, as appropriate, CSOSA will send a certified letter with return receipt requested to the home of the sex offender.

* * * * *

(e) CSOSA, either on its own accord or with its law enforcement partners, will conduct home verifications of registered sex offenders pursuant to the following schedule:

(1) Semi-annually, at least every six months, for all registered Class A sex offenders without supervision obligation.

(2) Annually, for all registered Class B sex offenders without a supervision obligation.

(3) As directed by CSOSA and consistent with Agency policy for all Class A and B sex offenders with supervision obligation.

Dated: December 3, 2012

Nancy M. Ware,

Director, CSOSA.

[FR Doc. 2012–29636 Filed 12–10–12; 8:45 am]

BILLING CODE 3129–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R03–OAR–2012–0386; FRL- 9761–5]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Redesignation of the West Virginia Portion of the Parkersburg-Marietta, WV–OH 1997 Annual Fine Particulate Matter ($PM_{2.5}$) Nonattainment Area to Attainment and Approval of the Associated Maintenance Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a redesignation request and State Implementation Plan (SIP) revision submitted by the State of West Virginia. The West Virginia Department of Environmental Protection (WVDEP) is requesting that the West Virginia portion of the Parkersburg-Marietta, WV–OH fine particulate matter ($PM_{2.5}$) nonattainment area (Parkersburg-Marietta Area or Area) be redesignated as attainment for the 1997 annual $PM_{2.5}$ national ambient air quality standard (NAAQS). The Parkersburg-Marietta Area is comprised of Wood County and a portion of Pleasants County in West Virginia (West Virginia portion of the Area); and Washington County in Ohio. In this rulemaking action, EPA is proposing to approve the $PM_{2.5}$ redesignation request for the West Virginia portion of the Parkersburg-Marietta Area. EPA is also proposing to approve the maintenance plan SIP revision that the State submitted in conjunction with its redesignation request. The maintenance plan provides for continued attainment of the 1997 annual $PM_{2.5}$ NAAQS for 10 years after redesignation of the West Virginia portion of the Area. The maintenance plan includes an insignificance determination for the on-road motor vehicle contribution of $PM_{2.5}$, nitrogen oxides (NO_X), and sulfur dioxide (SO_2) for the West Virginia portion of the Area for purposes of transportation conformity. EPA is proposing to find that West Virginia's insignificance determination for transportation conformity is adequate.[1] EPA is also proposing to find that the Area continues to attain the standard. This action to propose approval of the 1997 annual $PM_{2.5}$ NAAQS redesignation request, maintenance plan, and insignificance determination for transportation conformity for the West Virginia portion of the Area is based on EPA's determination that the Area has met the criteria for redesignation to attainment specified in the Clean Air Act (CAA). EPA is taking separate action to propose redesignation of the Ohio portion of the Parkersburg-Marietta Area.

DATES: Written comments must be received on or before January 10, 2013.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2012–0386 by one of the following methods:

A. *www.regulations.gov*. Follow the on-line instructions for submitting comments.

B. *Email: mastro.donna@epa.gov*

C. *Mail:* EPA–R03–OAR–2012–0386, Donna Mastro, Acting Associate Director, Office of Air Quality Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2012–0386. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the West Virginia Department of Environmental Protection, Division of Air Quality, 601 57th Street SE., Charleston, West Virginia 25304.

[1] On November 5, 2012, EPA initiated the comment period for this proposed insignificance determination on the Office of Transportation and Air Quality (OTAQ) web site *http://www.epa.gov/otaq/stateresources/transconf/currsips.htm*) in order to allow for a full 30 day public comment period in conjunction with this proposed rulemaking action.

FOR FURTHER INFORMATION CONTACT: Marilyn Powers, (215) 814–2308, or by e-mail at *powers.marilyn@epa.gov.*

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I. Summary of Actions

On March 5, 2012, the State of West Virginia through WVDEP formally submitted a request to redesignate the West Virginia portion of the Area from nonattainment to attainment of the 1997 annual $PM_{2.5}$ NAAQS. Concurrently, West Virginia submitted a maintenance plan for the Area as a SIP revision to ensure continued attainment throughout the Area over the next 10 years.

EPA is proposing to take several actions related to redesignation of the West Virginia portion of the Area to attainment for the 1997 annual $PM_{2.5}$ NAAQS. EPA is proposing to find that the West Virginia portion of the Area meets the requirements for redesignation of the $PM_{2.5}$ NAAQS under section 107(d)(3)(E) of the CAA. EPA is thus proposing to approve West Virginia's request to change the legal definition of the West Virginia portion of the Area from nonattainment to attainment for the 1997 annual $PM_{2.5}$ NAAQS. This action does not impact the legal definition of the Ohio portion of the area. EPA is taking separate action to redesignate the Ohio portion.

EPA is also proposing to approve the maintenance plan for the West Virginia portion of the Area as a revision to the West Virginia SIP. Such approval is one of the CAA criteria for redesignation of an area to attainment. The maintenance plan is designed to ensure continued attainment in the West Virginia portion of the Area for 10 years after redesignation. The maintenance plan includes an insignificance determination for the on-road motor vehicle contribution of $PM_{2.5}$, NO_X and SO_2 in the West Virginia portion of the Area for transportation conformity purposes. EPA has determined that the on-road motor vehicle insignificance finding that is included as part of West Virginia's maintenance plan for the 1997 annual $PM_{2.5}$ NAAQS is adequate, and is proposing to approve the insignificance determination. EPA's analysis of these proposed actions is discussed in Sections VI and VII of today's proposed rulemaking.

II. Background

A. General

The first air quality standards for $PM_{2.5}$ were established on July 18, 1997. 62 FR 38652 (July 18, 1997). EPA promulgated an annual standard at a level of 15 micrograms per cubic meter ($\mu g/m^3$), based on a three-year average of annual mean $PM_{2.5}$ concentrations. In the same rulemaking, EPA promulgated a 24-hour standard of 65 $\mu g/m^3$, based on a three-year average of the 98th percentile of 24-hour concentrations. On October 17, 2006, at 71 FR 61144, EPA retained the annual average standard at 15 $\mu g/m^3$ but revised the 24-hour standard to 35 $\mu g/m^3$, based again on the three-year average of the 98th percentile of 24-hour concentrations.

On January 5, 2005, at 70 FR 944, as supplemented on April 14, 2005, at 70 FR 19844, EPA designated the Parkersburg-Marietta Area as nonattainment for the 1997 p.m.$_{2.5}$ air quality standards. The Parkersburg-Marietta Area is comprised of Wood County and the Grant tax district in Pleasants County, West Virginia, and Washington County in Ohio. On November 13, 2009, at 74 FR 58688, EPA promulgated designations for the 24-hour standard set in 2006, designating the Parkersburg-Marietta Area as attaining this standard. In that action, EPA also clarified the designations for the NAAQS promulgated in 1997, stating that the Parkersburg-Marietta Area remained designated nonattainment for the 1997 annual $PM_{2.5}$ standard, but was designated attainment for the 1997 24-hour standard. Today's action therefore does not address attainment of either the 1997 or the 2006 24-hour NAAQS.

In response to legal challenges of the annual standard promulgated in 2006, the DC Circuit remanded the 2006 annual standard to EPA for further consideration. *See American Farm Bureau Federation and National Pork Producers Council, et al.* v. *EPA,* 559 F.3d 512 (DC Cir. 2009). However, given that the 1997 and 2006 annual standards are essentially identical, attainment of the 1997 annual standard would also indicate attainment of the remanded 2006 annual standard. Since the Parkersburg-Marietta Area is designated nonattainment only for the annual standard promulgated in 1997, today's action addresses redesignation to attainment only for this standard.

In a final rulemaking action dated December 2, 2011, at 76 FR 75464, EPA determined, pursuant to CAA section 179(c), that the entire Parkersburg-Marietta Area is attaining the 1997 annual $PM_{2.5}$ NAAQS. This determination of attainment was based upon complete, quality-assured and certified ambient air quality monitoring data for the period of 2007—2009 showing that the area had attained the NAAQS by its applicable attainment date of April 5, 2010.

B. Clean Air Interstate Rule (CAIR) and Cross State Air Pollution Rule (CSAPR or the Transport Rule)

On May 12, 2005, EPA published CAIR, which requires significant reductions in emissions of SO_2 and NO_X from electric generating units to limit the interstate transport of these pollutants and the ozone and fine particulate matter they form in the atmosphere. *See* 70 FR 25162. The DC Circuit initially vacated CAIR, *North Carolina* v. *EPA,* 531 F.3d 896 (DC Cir. 2008), but ultimately remanded the rule to EPA without vacatur to preserve the environmental benefits provided by CAIR. *See North Carolina* v. *EPA,* 550 F.3d 1176, 1178 (DC Cir. 2008). In response to the court's decision, EPA issued the Transport Rule, also known as CSAPR, to address interstate transport of NO_X and SO_2 in the eastern United States. *See* 76 FR 48208 (August 8, 2011). On August 21, 2012, the DC Circuit issued a decision to vacate the Transport Rule. In that decision, it also ordered EPA to continue administering CAIR ''pending the promulgation of a valid replacement.'' *EME Homer City Generation, L.P.* v. *EPA,* No. 11–1302 (DC Cir., August 21, 2012).[2]

In light of the above and as explained below, EPA proposes to approve the redesignation request for Wood County and the Grant tax district in Pleasants County, West Virginia, and the related maintenance plan SIP revision for maintaining attainment of the 1997 annual $PM_{2.5}$ NAAQS in the West Virginia portion of the Area. The air quality modeling analysis conducted for the Transport Rule demonstrates that the Parkersburg-Marietta Area would be able to attain the 1997 annual $PM_{2.5}$ NAAQS even in the absence of either CAIR or the Transport Rule. *See* ''Air Quality Modeling Final Rule Technical Support Document,'' App. B, B–115 to B–134. This modeling is available in the docket for the Transport Rule rulemaking. *See* FDMS Docket ID No.

[2] The court's judgment is not final, as of November 20, 2012, as the mandate has not yet been issued.

EPA–HQ–OAR–2009–0491. Nothing in the DC Circuit's August 21, 2012 decision disturbs or calls into question that conclusion or the validity of the air quality analysis on which it is based.

In addition, CAIR remains in place and enforceable until substituted by a ''valid'' replacement rule. West Virginia's SIP revision lists CAIR as a control measure that became State-effective on May 1, 2008 and was approved by EPA on August 4, 2009 for the purpose of reducing SO_2 and NO_X emissions. The monitoring data used to demonstrate the Area's attainment of the 1997 annual $PM_{2.5}$ NAAQS by the April 2010 attainment deadline was also impacted by CAIR. To the extent that the State is relying on CAIR in its maintenance plan, the recent directive from the DC Circuit in *EME Homer City* ensures that the reductions associated with CAIR will be permanent and enforceable for the necessary time period. EPA has been ordered by the Court to develop a new rule, and the opinion makes clear that after promulgating that new rule EPA must provide states an opportunity to draft and submit SIPs to implement that rule. CAIR thus cannot be replaced until EPA has promulgated a final rule through a notice-and-comment rulemaking process, states have had an opportunity to draft and submit SIPs, EPA has reviewed the SIPs to determine if they can be approved, and EPA has taken action on the SIPs, including promulgating a FIP if appropriate. These steps alone will take many years, even with EPA and the states acting expeditiously. The Court's clear instruction to EPA that it must continue to administer CAIR until a ''valid replacement'' exists provides an additional backstop; by definition, any rule that replaces CAIR and meets the Court's direction would require upwind states to eliminate significant downwind contributions.

Further, in vacating the Transport Rule and requiring EPA to continue administering CAIR, the D.C. Circuit emphasized that the consequences of vacating CAIR ''might be more severe now in light of the reliance interests accumulated over the intervening four years.'' *EME Homer City,* slip op. at 60. The accumulated reliance interests include the interests of states who reasonably assumed they could rely on reductions associated with CAIR which brought certain nonattainment areas into attainment with the NAAQS. If EPA were prevented from relying on reductions associated with CAIR in redesignation actions, states would be forced to impose additional, redundant reductions on top of those achieved by CAIR. EPA believes this is precisely the type of irrational result the court sought to avoid by ordering EPA to continue administering CAIR. For these reasons also, EPA believes it is appropriate to allow states to rely on CAIR, and the existing emissions reductions achieved by CAIR, as sufficiently permanent and enforceable pending a valid replacement rule for purposes such as redesignation. Following promulgation of the replacement rule, EPA will review SIPs as appropriate to identify whether there are any issues that need to be addressed.

III. Criteria for Redesignation to Attainment

The CAA provides the requirements for redesignating a nonattainment area to attainment. Specifically, section 107(d)(3)(E) of the CAA allows for redesignation providing that:

1. EPA determines that the area has attained the applicable NAAQS;

2. EPA has fully approved the applicable implementation plan for the area under section 110(k);

3. EPA determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable SIP and applicable Federal air pollutant control regulations and other permanent and enforceable reductions;

4. EPA has fully approved a maintenance plan for the area as meeting the requirements of CAA section 175A; and

5. The state containing such area has met all requirements applicable to the area under CAA section 110 and Part D.

EPA has provided guidance on redesignation in the General Preamble for the Implementation of title I of the CAA Amendments of 1990 (57 FR 13498 (April 16, 1992)) (supplemented by 57 FR 18070 (April 28, 1992)) and has provided further guidance on processing redesignation requests in the following documents:

1. ''Procedures for Processing Requests to Redesignate Areas to Attainment,'' Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992 (hereafter referred to as the ''Calcagni Memorandum'');

2. ''State Implementation Plan (SIP) Actions Submitted in Response to Clean Air Act (CAA) Deadlines,'' Memorandum from John Calcagni, Director, Air Quality Management Division, October 28, 1992; and

3. ''Part D New Source Review (Part D NSR) Requirements for Areas Requesting Redesignation to Attainment,'' Memorandum from Mary D. Nichols, Assistant Administrator for Air and Radiation, October 14, 1994.

IV. Reasons for Taking These Actions

On March 5, 2012, the WVDEP requested redesignation of the West Virginia portion of the Area to attainment for the 1997 annual $PM_{2.5}$ standard. As a part of the redesignation request, WVDEP submitted a maintenance plan for the West Virginia portion of the Area as a SIP revision, to ensure continued attainment of the 1997 annual $PM_{2.5}$ NAAQS over the next 10 years. EPA has determined that the Parkersburg-Marietta Area has attained the 1997 annual $PM_{2.5}$ standard and that West Virginia has met the requirements set forth in CAA section 107(d)(3)(E) for redesignation of the West Virginia portion of the Area.

V. Effect of These Proposed Actions

Final approval of the redesignation request would change the official designation of the West Virginia portion of the Area for the 1997 annual $PM_{2.5}$ NAAQS, found at 40 CFR part 81, from nonattainment to attainment. It would incorporate into the West Virginia SIP a maintenance plan ensuring continued attainment of the 1997 annual $PM_{2.5}$ NAAQS in the Area for the next 10 years. The maintenance plan includes, among other components, contingency measures to remedy any future violations of the 1997 annual $PM_{2.5}$ NAAQS (should they occur). Approval of the maintenance plan would also result in approval of the insignificance determination for $PM_{2.5}$, NO_X, and SO_2 for transportation conformity purposes in the West Virginia portion of the Area.

VI. Analysis of West Virginia's Redesignation Request

EPA proposes to redesignate the West Virginia portion of the Area to attainment for the 1997 annual $PM_{2.5}$ NAAQS and to approve into the West Virginia SIP the 1997 annual $PM_{2.5}$ NAAQS maintenance plan for the West Virginia portion of the Area. These actions are based upon EPA's determination that the Area continues to attain the 1997 annual $PM_{2.5}$ NAAQS and that all other redesignation criteria have been met for the West Virginia portion of the Area, provided EPA approves the base year emissions inventory that has been proposed in a separate rulemaking action. *See* 77 FR 60087 (Oct. 2, 2012). The following is a description of how the WVDEP March 5, 2012 submittal satisfies the requirements of section 107(d)(3)(E) of the CAA.

1. Attainment

As noted above, in a final rulemaking action dated December 2, 2011, at 76 FR 75464, EPA determined, pursuant to CAA section 179(c), that the entire Parkersburg-Marietta Area is attaining the 1997 annual $PM_{2.5}$ NAAQS. This determination of attainment was based upon complete, quality-assured and certified ambient air quality monitoring data for the period of 2007–2009 showing that the Area had attained the NAAQS by its applicable attainment date of April 5, 2010. Further discussion of pertinent air quality issues underlying this determination was provided in the notice of proposed rulemaking for EPA's determination of attainment for this Area, published on July 21, 2011 (76 FR 43634). EPA has reviewed more recent data in its Air Quality System (AQS) database, including certified, quality-assured data for the monitoring periods 2008–2010 and 2009–2011. This data, shown on Table 1, shows that the Parkersburg-Marietta Area continues to attain the 1997 annual $PM_{2.5}$ NAAQS (see the rulemaking docket for Parkersburg-Marietta Area AQS reports). In addition, as discussed below with respect to the maintenance plan, WVDEP has committed to continue monitoring in accordance with 40 CFR part 58. In summary, EPA has determined that the data submitted by West Virginia and data taken from AQS indicate that the Parkersburg-Marietta Area has attained and continues to attain the 1997 annual $PM_{2.5}$ NAAQS.

TABLE 1—DESIGN VALUE CONCENTRATIONS FOR THE PARKERSBURG-MARIETTA AREA FOR THE 1997 ANNUAL $PM_{2.5}$ NAAQS ($\mu g/m^3$) FOR 2008–2010 AND 2009–2011

County	Monitor ID	3-Year Annual Design Values	
		2008–2010	2009–2011
Wood County, WV	541071002	13.1	12.3

Note: There are no $PM_{2.5}$ monitors in the Ohio portion of the nonattainment area.

2. The Area Has Met All Applicable Requirements Under Section 110 and Part D of the CAA and Has a Fully Approved SIP Under Section 110(k) of the CAA

EPA has determined that the West Virginia portion of the Area has met all SIP requirements applicable for purposes of this redesignation under section 110 of the CAA (General SIP Requirements) and that, upon final approval of the 2002 base year inventory as discussed in section VI, it will have met all applicable SIP requirements under Part D of Title I of the CAA, in accordance with CAA section 107(d)(3)(E)(v). In addition, EPA is proposing to find that all applicable requirements of the West Virginia SIP for purposes of redesignation have been approved in accordance with CAA section 107(d)(3)(E)(ii). In making these proposed determinations, EPA ascertained which SIP requirements are applicable for purposes of redesignation of this Area and concluded that the applicable portions of the SIP meeting these requirements are fully approved under section 110(k) of the CAA. EPA notes that SIPs must be fully approved only with respect to applicable requirements.

a. CAA Section 110 General SIP Requirements

Section 110(a)(2) of Title I of the CAA delineates the general requirements for a SIP, which include enforceable emissions limitations and other control measures, means, or techniques, provisions for the establishment and operation of appropriate devices necessary to collect data on ambient air quality, and programs to enforce the limitations. The general SIP elements and requirements set forth in section 110(a)(2) include, but are not limited to, the following:

- Submittal of a SIP that has been adopted by the state after reasonable public notice and hearing;
- Provisions for establishment and operation of appropriate procedures needed to monitor ambient air quality;
- Implementation of a source permit program; provisions for the implementation of Part C requirements (Prevention of Significant Deterioration (PSD));
- Provisions for the implementation of Part D requirements for New Source Review (NSR) permit programs;
- Provisions for air pollution modeling; and
- Provisions for public and local agency participation in planning and emission control rule development.

Section 110(a)(2)(D) of the CAA requires that SIPs contain certain measures to prevent sources in a state from significantly contributing to air quality problems in another state. To implement this provision for various NAAQS, EPA has required certain states to establish programs to address transport of air pollutants in accordance with the NO_X SIP Call (63 FR 57356 (Oct. 27, 1998)), amendments to the NO_X SIP Call (64 FR 26298 (May 14, 1999) and 65 FR 11222 (March 2, 2000)), and CAIR (70 FR 25162 (May 12, 2005)). However, the CAA section 110(a)(2)(D) requirements for a state are not linked with a particular nonattainment area's designation and classification in that state. EPA believes that the requirements linked with a particular nonattainment area's designation and classifications are the relevant measures to evaluate in reviewing a redesignation request. The transport SIP submittal requirements, where applicable, continue to apply to a state regardless of the designation of any one particular area in the state. Thus, EPA does not believe that these requirements are applicable requirements for purposes of redesignation.

In addition, EPA believes that the other CAA section 110(a)(2) elements not connected with nonattainment plan submissions and not linked with an area's attainment status are not applicable requirements for purposes of redesignation. The Area will still be subject to these requirements after it is redesignated. EPA concludes that the CAA section 110(a)(2) and Part D requirements which are linked with a particular area's designation and classification are the relevant measures to evaluate in reviewing a redesignation request, and that CAA section 110(a)(2) elements not linked to the area's nonattainment status are not applicable for purposes of redesignation. This approach is consistent with EPA's existing policy on applicability of conformity (i.e., for redesignations) and oxygenated fuels requirement. *See* Reading, Pennsylvania, proposed and final rulemakings (61 FR 53174 (October 10, 1996)), (62 FR 24826 (May 7, 1997)); Cleveland-Akron-Lorain, Ohio final rulemaking (61 FR 20458 (May 7, 1996)); and Tampa, Florida, final rulemaking (60 FR 62748 (December 7, 1995)). *See also* the discussion on this issue in the Cincinnati redesignation (65

FR at 37890 (June 19, 2000)) and in the Pittsburgh redesignation (66 FR at 53099 (Oct. 19, 2001)).

EPA has reviewed the West Virginia SIP and have concluded that it meets the general SIP requirements under section 110(a)(2) of the CAA to the extent they are applicable for purposes of redesignation. EPA has previously approved provisions of West Virginia's SIP addressing section 110(a)(2) requirements, including provisions addressing $PM_{2.5}$. *See* 76 FR 47062 (August 4, 2011). These requirements are, however, statewide requirements that are not linked to the $PM_{2.5}$ nonattainment status of the Parkersburg-Marietta Area. Therefore, EPA believes that these SIP elements are not applicable requirements for purposes of review of the State's $PM_{2.5}$ redesignation request.

b. Part D Nonattainment Requirements Under the Standard

Subpart 1 of Part D, sections 172 to 175 of the CAA, set forth the basic nonattainment plan requirements applicable to $PM_{2.5}$ nonattainment areas. Under CAA section 172, states with nonattainment areas must submit plans providing for timely attainment and must meet a variety of other requirements. On September 9, 2008, WVDEP submitted an attainment plan and base year inventory for the West Virginia portion of the Area to meet its part D requirements. On November 20, 2009, at 74 FR 60199, EPA made a determination that the Parkersburg-Marietta Area was attaining the 1997 annual $PM_{2.5}$ NAAQS. Pursuant to 40 CFR 51.1004(c), upon a determination by EPA that an area designated nonattainment for the $PM_{2.5}$ NAAQS has attained the standard, the requirement for such an area to submit an attainment demonstration and associated reasonably available control measures (RACM), a reasonable further progress plan (RFP), contingency measures, and other planning SIPs related to the attainment of the $PM_{2.5}$ NAAQS are suspended until the area is redesignated to attainment or EPA determines that the area has again violated the $PM_{2.5}$ NAAQS, at which time such plans are required to be submitted. The September 9, 2008 submittal is relevant to this proposed action to redesignate the West Virginia portion of the Area only with respect to the base year inventory that was submitted with the attainment plan. In a separate rulemaking action, as detailed below, EPA has proposed approval of the base year inventory, which, upon final approval, will meet the requirements of CAA section 172(c)(3), one of the criteria for redesignation. *See* 77 FR 60087 (October 2, 2012).

The General Preamble for Implementation of Title I also discusses the evaluation of these requirements in the context of EPA's consideration of a redesignation request. The General Preamble sets forth EPA's view of applicable requirements for purposes of evaluating redesignation requests when an area is attaining the standard. *See* General Preamble for Implementation of Title I (57 FR 13498 (April 16, 1992)).

Because attainment has been reached for the Area, no additional measures are needed to provide for attainment, and CAA section 172(c)(1) requirements for an attainment demonstration and RACM are no longer considered to be applicable for purposes of redesignation as long as the area continues to attain the standard until redesignation. *See also* 40 CFR 51.1004(c). The RFP requirement under CAA section 172(c)(2) and contingency measures requirement under CAA section 172(c)(9) are similarly not relevant for purposes of redesignation.

Section 172(c)(3) of the CAA requires submission of a comprehensive, accurate, and current inventory of actual emissions. As part of West Virginia's attainment plan submittal, the State submitted a 2002 emissions inventory. On November 20, 2009 (74 FR 60199), EPA determined that the Parkersburg-Marietta Area was attaining the 1997 annual $PM_{2.5}$ NAAQS, based on complete, quality-assured data for the period of 2007–2009. That rulemaking action suspended certain planning requirements related to attainment, including the RACT/RACM requirement of section 172(c)(1), the RFP requirement of CAA section 172(c)(2), the attainment demonstration requirement of CAA section 172(c)(3), and the requirement for contingency measures in CAA section 172(c)(9). As a result of the determination of attainment, the only remaining requirement under CAA section 172 to be considered for purposes of redesignation of the West Virginia portion of the Area is the emissions inventory required under CAA section 172(c)(3). On October 2, 2012 (77 FR 60087), EPA proposed approval of the base year inventory for the West Virginia portion of the Area for the 1997 annual $PM_{2.5}$ NAAQS. An evaluation of West Virginia's 2002 base year inventory for the West Virginia portion of the Area is provided in the Technical Support Document (TSD) prepared by EPA for that rulemaking action. *See* Docket ID No. EPA–R03–OAR–2010–0077. In that action, EPA determined that the emissions inventory and emissions statement requirements for the West Virginia portion of the Area have been satisfied, and proposed to approve the inventory as meeting the requirements of CAA section 172(c)(3). Final approval of the emissions inventory in that separate rulemaking action will satisfy the emissions inventory requirement for redesignation under CAA section 172(c)(3).

Section 172(c)(4) of the CAA requires the identification and quantification of allowable emissions for major new and modified stationary sources in an area, and CAA section 172(c)(5) requires source permits for the construction and operation of new and modified major stationary sources anywhere in the nonattainment area. EPA has determined that, since prevention of significant deterioration (PSD) requirements will apply after redesignation, areas being redesignated need not comply with the requirement that a nonattainment new source review (NSR) program be approved prior to redesignation, provided that the area demonstrates maintenance of the NAAQS without part D NSR. A more detailed rationale for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation, dated October 14, 1994, entitled, ''*Part D New Source Review Requirements for Areas Requesting Redesignation to Attainment.''* Nevertheless, West Virginia currently has an approved NSR program, codified in 45 CSR 19. *See* 71 FR 64468 (November 2, 2006) (approving NSR program into the SIP). *See also* 77 FR 63736 (October 17, 2012) (approving revisions to West Virginia's PSD program). However, the State's PSD program for annual $PM_{2.5}$ will become effective in the Parkersburg-Marietta Area upon redesignation to attainment.

Section 172(c)(6) of the CAA requires the SIP to contain control measures necessary to provide for attainment of the standard. Because attainment has been reached, no additional measures are needed to provide for attainment.

Section 172(c)(7) of the CAA requires the SIP to meet the applicable provisions of CAA section 110(a)(2). As noted previously, EPA believes the West Virginia SIP meets the requirements of CAA section 110(a)(2) applicable for purposes of redesignation.

Section 176(c) of the CAA requires states to establish criteria and procedures to ensure that Federally supported or funded projects conform to the air quality planning goals in the applicable SIP. The requirement to determine conformity applies to transportation plans, programs, and projects that are developed, funded or

approved under title 23 of the United States Code (U.S.C.) and the Federal Transit Act (transportation conformity) as well as to all other Federally supported or funded projects (general conformity). State transportation conformity SIP revisions must be consistent with Federal conformity regulations relating to consultation, enforcement and enforceability which EPA promulgated pursuant to its authority under the CAA.

EPA interprets the conformity SIP requirements as not applying for purposes of evaluating a redesignation request under CAA section 107(d) because state conformity rules are still required after redesignation, and Federal conformity rules apply where state rules have not been approved. *See Wall* v. *EPA,* 265 F. 3d 426 (6th Cir. 2001) (upholding this interpretation); *see also* 60 FR 62748 (Dec. 7, 1995) (discussing Tampa, Florida). Thus, EPA determines that the West Virginia portion of the Area has satisfied all applicable requirements for purposes of redesignation under CAA section 110, and, upon final approval of the 2002 base year inventory proposed on October 2, 2012, will have satisfied all applicable requirements under part D of title I of the CAA.

c. The West Virginia Portion of the Area Has a Fully Approved Applicable SIP Under Section 110(k) of the CAA

Upon final approval of the 2002 base year inventory, as proposed in the October 2, 2012 rulemaking action, EPA will have fully approved the West Virginia portion of the Area under section 110(k) of the CAA for all requirements applicable for purposes of redesignation to attainment for the 1997 annual $PM_{2.5}$ standard. Therefore, upon final approval of the 2002 base year emissions inventory, EPA will have approved all part D title 1 requirements applicable for purposes of this redesignation for the West Virginia portion of the Area.

3. The Air Quality Improvement in the West Virginia portion of the Area is Due to Permanent and Enforceable Reductions in Emissions Resulting From Implementation of the SIP and Applicable Federal Air Pollution Control Regulations and Other Permanent and Enforceable Reductions

For redesignating a nonattainment area to attainment, CAA section 107(d)(3)(E)(iii) requires EPA to determine that the air quality improvement in the area is due to permanent and enforceable reductions in emissions resulting from implementation of the SIP and applicable Federal air pollution control regulations and other permanent and enforceable reductions. EPA believes that West Virginia has demonstrated that the observed air quality improvement in the West Virginia portion of the Area is due to permanent and enforceable reductions in emissions resulting from implementation of the SIP, Federal measures, and other state-adopted measures. In making this demonstration, West Virginia has calculated the change in emissions between 2005, one of the years used to designate the Area as nonattainment, and 2008, one of the years for which the Area monitored attainment, shown in Table 2.

TABLE 2—COMPARISON OF THE 2005 BASE YEAR AND 2008 ATTAINMENT YEAR FOR THE PARKERSBURG-MARIETTA AREA, IN TONS PER YEAR (TPY)

		2005	2008	Decrease
SO_2	Electric Generating Units (EGUs)	193,253	149,152	44,101
	Non-EGUs	16,056	9,724	6,332
	Area Sources	748	544	204
	Locomotive & Marine	112	75	37
	Onroad	59	19	40
	Nonroad	73	21	52
NO_X	EGUs	28,455	25,420	3,035
	Non-EGU	3,332	2,958	374
	Area Sources	911	587	324
	Locomotive & Marine	1,926	1,307	619
	Onroad	5,201	4,412	789
	Nonroad	841	727	114
$PM_{2.5}$	EGUs	1,745	1,680	65
	Non-EGU	848	804	44
	Area Sources	1101	944	157
	Locomotive & Marine	64	39	25
	Onroad	173	143	30
	Nonroad	75	66	9

The reduction in emissions and the corresponding improvement in air quality over this time period can be attributed to a number of Federal and other measures that the Parkersburg-Marietta Area and contributing areas have implemented in recent years.

a. Federal Measures Implemented

Reductions in $PM_{2.5}$ precursor emissions have occurred statewide and in upwind states as a result of Federal emission control measures with additional emission reductions expected to occur in the future. Federal emission control measures include the following:

(1) Tier 2 Emission Standards for Vehicles and Gasoline Sulfur Standards

These emission control requirements result in lower NO_X and SO_2 emissions from new cars and light duty trucks, including sport-utility vehicles. The Federal rules were phased in between 2004 and 2009. EPA has estimated that, after phasing in the new requirements, new vehicles emit less NO_X in the following percentages: Passenger cars and light duty vehicles—77 percent; light duty trucks, minivans, and sports utility vehicles—86 percent; and larger sports utility vehicles, vans, and heavier trucks—69 to 95 percent. EPA expects fleet wide average emissions to decline by similar percentages as new vehicles replace older vehicles. The Tier 2 standards also reduced the sulfur content of gasoline to 30 parts per

million (ppm) beginning in January 2006, which reflects up to a 90 percent reduction in sulfur content.

(2) Heavy-Duty Diesel Engine Rule

EPA issued this rule in July 2000. This rule includes standards limiting the sulfur content of diesel fuel, which went into effect in 2004. A second phase took effect in 2007 which reduced $PM_{2.5}$ emissions from heavy-duty highway engines and further reduced the highway diesel fuel sulfur content to 15 ppm. The total program is estimated to achieve a 90 percent reduction in direct $PM_{2.5}$ emissions and a 95 percent reduction in NO_X emissions for these new engines using low sulfur diesel, compared to existing engines using higher sulfur diesel fuel. The reduction in fuel sulfur content also yielded an immediate reduction in sulfate particle emissions from all diesel vehicles.

(3) Nonroad Diesel Rule

In May 2004, EPA promulgated a new rule for large nonroad diesel engines, such as those used in construction, agriculture, and mining, to be phased in between 2008 and 2014. The rule also reduces the sulfur content in nonroad diesel fuel by over 99 percent. Prior to 2006, nonroad diesel fuel averaged approximately 3,400 ppm sulfur. This rule limited nonroad diesel sulfur content to 500 ppm by 2006, with a further reduction to 15 ppm by 2010.

b. Controls on $PM_{2.5}$ Precursors

The Parkersburg-Marietta Area's air quality is strongly affected by regulation of SO_2 and NO_X from power plants. EPA promulgated the NO_X SIP Call, CAIR, and CSAPR to address SO_2 and NO_X emissions from electric generating units (EGUs) and certain non-EGUs across the eastern United States. The affected EGUs in the West Virginia portion of the Area are the Pleasants Power Station, Willow Island Power Station, and Pleasants Energy. Additionally, because $PM_{2.5}$ concentrations in the Area are impacted by the transport of sulfates and nitrates, the Area's air quality is affected by SO_2 and NO_X emissions from power plants in states in the region that significantly contribute to the Area. EPA reviewed SO_2 and NO_X emissions from EGUs in states that contribute to the Area, which show that states impacting the Area reduced SO_2 and NO_X emissions from EGUs by 1,426,166 tpy and 619,601 tpy, respectively, between 2002 and 2008, continuing the generally downward trend of SO_2 and NO_X emissions from these states. Information on the reductions made by states that contribute to the Area is available at the Air Markets Program Data (AMPD) [3] database at *http://ampd.epa.gov/ampd/.*

(1) NO_X SIP Call

EPA issued the NO_X SIP Call in 1998 pursuant to the CAA to require 22 states and the District of Columbia to reduce NO_X emissions from large EGUs and large non-EGUs such as industrial boilers, internal combustion engines, and cement kilns. (63 FR 57356, October 27, 1998). EPA approved West Virginia's Phase I NO_X SIP Call rule in 2002 and Phase II in 2006. Emission reductions resulting from regulations developed in response to the NO_X SIP Call are permanent and enforceable.

(2) CAIR and CSAPR

EPA approved West Virginia's CAIR rules in 2009 (74 FR 38536, August 4, 2009). The maintenance plan for the West Virginia portion of the Area thus lists CAIR as a control measure for the purpose of reducing SO_2 and NO_X emissions from EGUs.

As previously discussed, the D.C. Circuit's 2008 remand of CAIR left the rule in place to ''temporarily preserve the environmental values covered by CAIR'' until EPA replaced it with a rule consistent with the court's opinion, and the court's August 2012 decision on the Transport Rule also left CAIR in effect until the legal challenges to the Transport Rule are resolved. As noted, EPA believes it is appropriate to allow states to rely on CAIR, and the existing emissions reductions achieved by CAIR, as sufficiently permanent and enforceable pending a valid replacement rule, for purposes such as redesignation.

Furthermore, as previously discussed, the air quality modeling analysis conducted for the Transport Rule demonstrates that the Parkersburg-Marietta Area would be able to attain the 1997 annual $PM_{2.5}$ NAAQS even in the absence of either CAIR or the Transport Rule. EPA's modeling projections show that all ambient monitors in the Area are expected to continue to maintain compliance in the 2012 and 2014 ''no CAIR'' base cases. Therefore, none of the ambient monitoring sites in the Parkersburg-Marietta Area are ''receptors'' that EPA projects will have future nonattainment problems or difficulty maintaining the NAAQS. EPA finds West Virginia appropriately included CAIR as a control measure.

(3) Controls on $PM_{2.5}$ Precursors From EGUs in the Area

First Energy's Pleasants Power Station, located in the Grant tax district of Pleasants County has installed additional controls which will continue to contribute to the reductions in precursor pollutants for $PM_{2.5}$. Pleasants Power Station has been equipped with selective catalytic reduction (SCR) since 2003, and in 2007 eliminated the 15 percent flue gas bypass to increase the efficiency of the scrubber. It is also covered by a State consent order that requires the operation of the SCR whenever the units are in operation, except for periods of required SCR maintenance, beginning January 1, 2009. The consent order is included as part of West Virginia's March 5, 2012 submittal, available in the docket for this rulemaking action at *www.regulations.gov,* and will become federally enforceable upon redesignation of this Area. In the Ohio portion of the Area, the Muskingum River Station in Washington County, Ohio, has implemented, as part of a federally enforceable consent decree, continuous operation of NO_X controls on unit #5 and is required to retire, repower, or retrofit all remaining units by 2015. Also, the R.H. Gorsuch Station in Washington County permanently shut down at the end of 2010. Table 3 shows the reductions from EGUs in the Area between 2005 and 2008.

TABLE 3—SUMMARY OF REDUCTIONS FROM EGUS IN THE PARKERSBURG-MARIETTA AREA, IN TPY

		2005	2008	Reductions
West Virginia	SO_2	52,296	15,804	36,492
	NO_X	16,137	8,251	4,067
	$PM_{2.5}$	1,360	1,287	73
Ohio	SO_2	140,957	133,348	7609
	NO_X	16,137	17,169	−1032

[3] Formerly the Clean Air Markets Program (CAMD) database.

TABLE 3—SUMMARY OF REDUCTIONS FROM EGUS IN THE PARKERSBURG-MARIETTA AREA, IN TPY—Continued

		2005	2008	Reductions
	$PM_{2.5}$	385	393	−8

Based on the information summarized above, West Virginia has adequately demonstrated that the improvement in air quality is due to permanent and enforceable emissions reductions. The reductions result from Federal requirements, a Federally enforceable consent decree, regulation of precursors under the NO_X SIP Call and CAIR, and a State consent order affecting EGUs in the Area. These reductions are all expected to continue into the future.

4. The West Virginia Portion of the Area Has a Fully Approvable Maintenance Plan Pursuant to Section 175A of the CAA

In conjunction with its request to redesignate the West Virginia portion of the Area to attainment status, West Virginia submitted a SIP revision to provide for maintenance of the 1997 annual $PM_{2.5}$ NAAQS in the Area for at least 10 years after redesignation. West Virginia is requesting that EPA approve this SIP revision as meeting the requirement of CAA section 175A. Once approved, the maintenance plan for the West Virginia portion of the Area will ensure that the SIP for West Virginia meets the requirements of the CAA regarding maintenance of the 1997 annual $PM_{2.5}$ NAAQS for this Area.

a. Requirements of a Maintenance Plan

Section 175 of the CAA sets forth the elements of a maintenance plan for areas seeking redesignation from nonattainment to attainment. Under CAA section 175A, the plan must demonstrate continued attainment of the applicable NAAQS for at least 10 years after approval of a redesignation of an area to attainment. Eight years after the redesignation, West Virginia must submit a revised maintenance plan demonstrating that attainment will continue to be maintained for the 10 years following the initial 10-year period. To address the possibility of future NAAQS violations, the maintenance plan must contain such contingency measures, with a schedule for implementation, as EPA deems necessary to assure prompt correction of any future $PM_{2.5}$ violations. The Calcagni Memorandum dated September 4, 1992 provides additional guidance on the content of a maintenance plan. The Calcagni Memorandum states that a $PM_{2.5}$ maintenance plan should address the following provisions:

(1) An attainment emissions inventory;

(2) a maintenance demonstration showing maintenance for 10 years;

(3) a commitment to maintain the existing monitoring network;

(4) verification of continued attainment; and

(5) a contingency plan to prevent or correct future violations of the NAAQS.

b. Analysis of the Maintenance Plan

(1) Attainment Emissions Inventory

An attainment inventory is comprised of the emissions during the time period associated with the monitoring data showing attainment. WVDEP determined that the appropriate attainment inventory year is 2008, one of the years in the period during which the Parkersburg-Marietta Area monitored attainment of the 1997 annual $PM_{2.5}$ NAAQS, as described previously. The 2008 inventory contains primary $PM_{2.5}$ emissions (including condensables), SO_2, and NO_X, but did not include volatile organic compounds (VOC) or ammonia (NH_3), which were insignificant. The 2008 point source inventory contained emissions for EGUs and non-EGU sources in Wood County and the Grant tax district of Pleasants County, and included Pleasants, Willow Island, and Pleasants Energy power plants and the Cabot Black Carbon (Cabot) and Cytec Industries (Cytec) non-EGU plants. West Virginia used its 2008 annual emissions inventory submitted to EPA's National Emissions Inventory (NEI) database and EPA's AMPD database to compile the 2008 point source inventory. For the 2008 nonpoint emissions, WVDEP used 2008 NEI version 1.5 data developed by EPA, and for 2008 nonroad mobile sources, WVDEP used the NONROAD model to generate emissions. The 2008 onroad mobile source inventory was developed using the current version of Motor Vehicle Emissions Simulator (MOVES), i.e., MOVES2010a. The Ohio Department of Transportation (ODOT) and the Wood-Washington-Wirt Interstate Planning Commission (WWW) performed the analysis, in coordination with the Ohio Environmental Protection Agency (OEPA) and WVDEP. The analysis included additional data provided by WVDEP and the West Virginia Department of Transportation (WVDOT). EPA reviewed the submitted emissions inventory and found them to be approvable.

(2) Maintenance Demonstration

For a demonstration of maintenance, emissions inventories are required to be projected to future dates to assess the influence of future growth and controls; however, the demonstration need not be based on modeling. *See Wall* v. *EPA, supra; Sierra Club* v. *EPA, supra. See also* 66 FR at 53099–53100; 68 FR at 25430–32. On March 5, 2012, the WVDEP submitted a maintenance plan for the West Virginia portion of the Area as required by section 175A of the CAA. WVDEP uses projection inventories to show that the Area will remain in attainment and developed projection inventories for an interim year of 2015 and a maintenance plan end year of 2022 to show that future emissions of NO_X, SO_2, and direct $PM_{2.5}$ remain at or below the attainment year 2008 emissions levels throughout the West Virginia portion of the Area through at least the year 2022.

(a) 2015 and 2022 Projection Emission Inventories

For EGU emissions projections, WVDEP used EPA's Integrated Planning Model (IPM) projections that supported CSAPR. 2015 data was taken from these IPM runs, and 2022 projections were developed by interpolating between the IPM runs from 2020 and 2030. The EGUs considered included Pleasants, Willow Island, and Pleasants Energy Power Stations located in the tax district in Pleasants County. Non-EGU point sources (including Cytec, but not Cabot, which was shut down in 2008), area sources, and locomotive/marine source inventories for 2015 and 2022 were projected by applying, to the 2008 inventory, the growth factors developed from economic forecasts by Workforce West Virginia. Nonroad source emissions for 2015 and 2022 were developed using annualized NONROAD model. Onroad mobile emission projections for 2015 and 2022 were calculated by ODOT using MOVES2010a.

EPA has determined that the methodologies for projecting emissions inventories provided by WVDEP are acceptable. More detail on EPA's analysis of the methodologies used by

West Virginia for projection inventories may be found in the TSD related to emissions inventories available in the docket for this rulemaking action. Tables 4 and 5 show the inventories for the 2008 attainment base year, the 2015 interim year, and the 2022 maintenance plan end year for the West Virginia portion of the Area and the entire nonattainment area, respectively. These tables show that projected inventories remain below the 2008 attainment year inventory. Table 5 shows that between 2008 and 2022, the Area is projected to reduce SO_2 emissions by 111,095 tpy, NO_X emissions by 22,426 tpy, and direct $PM_{2.5}$ emissions by 130 tpy. Thus the projected emissions inventories show that the Area will continue to maintain the annual $PM_{2.5}$ standard during the maintenance period.

TABLE 4—COMPARISON OF 2008, 2015, 2022 SO_2, NO_X, AND DIRECT $PM_{2.5}$ EMISSION TOTALS, IN TPY FOR THE WEST VIRGINIA PORTION OF THE AREA

	SO_2 (tpy)	NO_X (tpy)	$PM_{2.5}$ (tpy)
2008	20,749	13,046	2,483
2015	9,668	7,069	2,450
2022	11,088	6,568	2,375
Decrease from 2008 to 2022	9,660	6,478	107

TABLE 5—COMPARISON OF 2008, 2015, 2022 SO_2, NO_X, AND DIRECT $PM_{2.5}$ EMISSION TOTALS, IN TONS PER YEAR (TPY) FOR THE ENTIRE PARKERSBURG-MARIETTA NONATTAINMENT AREA WV–OH

	SO_2 (tpy)	NO_X (tpy)	$PM_{2.5}$ (tpy)
2008	159,535	35,412	3,686
2015	77,294	18,509	3,648
2022	48,439	12,985	3,557
Decrease from 2008 to 2022	111,095	22,426	130

(b) Maintenance Demonstration Through 2023

As noted in section 4.a of this notice, CAA section 175A requires a state seeking redesignation to attainment to submit a SIP revision to provide for the maintenance of the NAAQS in the area ''for at least 10 years after the redesignation.'' EPA has interpreted this as a showing of maintenance ''for a period of ten years following redesignation.'' Calcagni Memorandum at p. 9. Where the emissions inventory method of showing maintenance is used, its purpose is to show that emissions during the maintenance period will not increase over the attainment year inventory. Calcagni Memorandum at pp. 9–10.

As discussed in detail above, the State's maintenance plan submission expressly documents that the Area's emissions inventories will remain below the attainment year inventories through at least 2022. In addition, for the reasons set forth below, EPA believes that the State's submission, in conjunction with additional supporting information, further demonstrates that the Area will continue to maintain the 1997 annual $PM_{2.5}$ NAAQS at least through 2023:

• Significant emissions controls remain in place and will continue to provide reductions that keep the Area in attainment. First Energy's Pleasants Power Station, located in Pleasants County, is covered by a State consent decree that requires the operation of SCR controls on the EGU, beginning January 1, 2009.

• West Virginia has committed to maintaining all of the control measures upon which it relies in its March 5, 2012 submittal and will submit any changes to EPA for approval as a SIP revision.

• Emissions inventory levels for SO_2 and NO_X in 2022 are well below the attainment year inventory levels (see Table 4), and EPA believes that it is highly improbable that sudden increases would occur that could exceed the attainment year inventory levels in 2023.

• The mobile source contribution has been determined to be insignificant, and is expected to remain insignificant in 2023 with fleet turnover in upcoming years that will result in cleaner vehicles and cleaner fuels. Further, the transportation conformity analysis of historical trends and growth patterns indicates that this determination should not change, out to 2030.

• Air quality concentrations, which are well below the standard, coupled with the emissions inventory projections through 2022, demonstrate that it would be very unlikely for a violation to occur in 2023. The 2009–2011 design value of 12.3 $\mu g/m^3$ provides a sufficient margin in the event any emissions increase. In addition, the 2009–2011 design value shows the continued downward trend of monitored data in this Area for the last several years.

Thus, even if EPA finalizes its proposed approval of the redesignation request and maintenance plans in 2013, EPA's approval is based on a showing, in accordance with CAA section 175A, that the State's maintenance plan provides for maintenance for at least ten years after redesignation.

(3) Monitoring Network

EPA has determined that West Virginia's maintenance plan includes a commitment to continue to operate its EPA-approved monitoring network, as necessary to demonstrate ongoing compliance with the NAAQS. West Virginia currently operates a $PM_{2.5}$ monitor in Wood County. In its March 5, 2012 submittal, West Virginia states that it will consult with EPA prior to making any necessary changes to the network and will continue to quality assure the monitoring data in accordance with the requirements of 40 CFR part 58.

(4) Verification of Continued Attainment

To provide for tracking of the emission levels in the Area, WVDEP requires major point sources to submit air emissions information annually and prepares a new periodic inventory for all $PM_{2.5}$ precursors every three years in accordance with EPA's Air Emissions Reporting Requirements (AERR). WVDEP will continue to compare emissions information to the attainment year inventory to assure continued attainment with the 1997 annual $PM_{2.5}$

NAAQS and that WVDEP will use this information to assess emissions trends, as necessary.

(5) The Maintenance Plan's Contingency Measures

The contingency plan provisions for the maintenance plan are designed to promptly correct a violation of the NAAQS that occurs after redesignation. Section 175A of the CAA requires that a maintenance plan include such contingency measures as EPA deems necessary to ensure that a state will promptly correct a violation of the NAAQS that occurs after redesignation. The maintenance plan should identify the events that would ''trigger'' the adoption and implementation of a contingency measure(s), the contingency measure(s) that would be adopted and implemented, and the schedule indicating the time frame by which the state would adopt and implement the measure(s).

The ability of the West Virginia portion of the Area to stay in compliance with the $PM_{2.5}$ standard after redesignation depends upon NO_X and SO_2 emissions in the Parkersburg-Marietta Area remaining at or below 2008 levels. West Virginia's maintenance plan projects NO_X and SO_2 emissions to decrease and stay below 2008 levels through at least the year 2022. West Virginia's maintenance plan outlines the procedures for the adoption and implementation of contingency measures to further reduce emissions should a violation occur.

West Virginia's contingency measures include a Warning Level Response and an Action Level response. An initial Warning Level Response is triggered when the average weighted annual mean for a single calendar year exceeds 15.5 $\mu g/m^3$ within the maintenance area. In that case, a study will be conducted to determine if the emissions trends show increases; if action is necessary to reverse emissions increases, West Virginia will follow the same procedures for control selection and implementaiton as for an Action Level Response. Implementation of necessary controls will take place as expeditiously as possible, but no later than 12 months from the end of the most recent calendar year.

The Action Level Response will be prompted by any one of the following: A Warning Level Response study that shows emissions increases, a weighted annual mean over a two-year average that exceeds the standard, or a violation of the standard in the maintenance area. If an Action Level Response is triggered, West Virginia will adopt and implement appropriate control measures within 18 months from the end of the year in which monitored air quality triggering a response occurs. West Virginia will also consider whether additional regulations that are not a part of the maintenance plan can be implemented in a timely manner to respond to the trigger.

West Virginia's candidate contingency measures include the following: (1) Diesel reduction emission strategies, (2) alternative fuels and diesel retrofit programs for fleet vehicle operations, (3) $PM_{2.5}$, SO_2, and NO_X emissions offsets for new and modified major sources, (4) concrete manufacturing controls, and (5) additional NO_X reductions. Additionally, West Virginia has identified a list of sources that could potentially be controlled. These include: Industrial, commercial and institutional (ICI) boilers for SO_2 and NO_X controls, EGUs, process heaters, internal combustion engines, combustion turbines, other sources greater than 100 tons per year, fleet vehicles, and aggregate processing plants. EPA finds that the West Virginia maintenance plan for the Parkersburg-Marietta Area includes appropriate contingency measures as necessary to ensure that West Virginia will promptly correct any violation of the NAAQS that occur after redesignation.

For all of the reasons discussed above, EPA is proposing to approve West Virginia's 1997 annual $PM_{2.5}$ NAAQS maintenance plan for the West Virginia portion of the Area as meeting the requirements of CAA section 175A.

VII. Analysis of West Virginia's Transportation Conformity Insignificance Determination for the Parkersburg-Marietta Area

Under section 176(c) of the CAA, new transportation projects, such as the construction of new highways, must ''conform'' to (i.e., be consistent with) the part of the state's air quality plan that addresses pollution from mobile sources. ''Conformity'' to the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of a NAAQS or an interim milestone. This is typically determined by showing that estimated emissions from existing and planned highway and transit systems are less than or equal to the motor vehicle emissions budgets (MVEBs) contained in a SIP. If a transportation plan does not ''conform,'' most new projects that would expand the capacity of roadways cannot go forward. Regulations at 40 CFR part 93 set forth EPA policy, criteria, and procedures for demonstrating and ensuring conformity of such transportation activities to a SIP.

When reviewing submitted ''control strategy'' SIPs or maintenance plans containing MVEBs, EPA must affirmatively find the MVEBs contained therein ''adequate'' for use in determining transportation conformity. The process for determining adequacy is set forth in the guidance ''*Transportation Conformity Rule Amendments for the New 8-hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards and Miscellaneous Revisions for Existing Areas; Transportation Conformity Rule Amendments; Response to Court Decision and Additional Rule Changes.*'' 69 FR 40004 (July 1, 2004). After EPA affirmatively finds the submitted MVEBs are adequate for transportation conformity purposes, in accordance with the guidance, the MVEBs can be used by state and Federal agencies in determining whether proposed transportation projects ''conform'' to the SIP as required by section 176(c) of the CAA.

For budgets to be approvable, they must meet, at a minimum, EPA's adequacy criteria in 40 CFR 93.118(e)(4). However, the transportation conformity rule at 40 CFR 93.109(f) allows areas to forego establishment of MVEBs where it is demonstrated that the regional motor vehicle emissions for a particular pollutant or precursor are an insignificant contributor to the air quality problem in an area. EPA's rationale for providing for insignificance determinations may be found in the July 1, 2004 revision to the Transportation Conformity Rule. The general criteria for insignificance determinations, per 40 CFR 93.109(f), are based on a number of factors, including the percentage of motor vehicle emissions in the context of the total SIP inventory; the current state of air quality as determined by monitoring data for the relevant NAAQS; the absence of SIP motor vehicle control measures; and the historical trends and future projections of the growth of motor vehicle emissions in the area.

In West Virginia's March 5, 2012 submittal, the State provided information that projects that onroad mobile source NO_X emissions constitute 12 percent or less of the Area's total NO_X emissions in 2015 and 2022 due to continuing fleet turnover and that onroad mobile source $PM_{2.5}$ emissions constitute less than 2.1 percent of the Area's total $PM_{2.5}$ emissions. Both projections took into consideration future vehicle miles traveled (VMT) growth. In addition, neither EPA nor the State has made any findings that VOCs, SO_2, or NH_3 are significant contributors to $PM_{2.5}$ mobile emissions. While the

level of NO_X is higher than the 10 percent benchmark, WVDEP has provided additional information that supports its insignificance determination for NO_X. For more detail on EPA's analysis of West Virginia's insignificance determination, see the Transportation Conformity TSD in the docket for today's rulemaking. Therefore, the March 5, 2012 submittal meets the criteria in the relevant portions of 40 CFR 93.102 and 93.118 for an insignificance finding, and EPA agrees with the determination of insignificance for both NO_X and $PM_{2.5}$ for the West Virginia portion of the Area. As previously discussed, EPA initiated a comment period on November 5, 2012 on the proposed insignificance determination for the West Virginia portion of the Area on the OTAQ Web site to allow for a 30-day review of this proposed insignificance determination in conjunction with this proposed rulemaking. EPA is proposing to find that West Virginia's insignificance determination for transportation conformity is adequate. For more information on EPA's insignificance findings, see the TSD dated August 3, 2012, available in the docket for this rulemaking at *www.regulations.gov*.

VIII. Proposed Actions

EPA is proposing to approve the redesignation of the West Virginia portion of the Area from nonattainment to attainment for the 1997 annual $PM_{2.5}$ NAAQS. EPA has evaluated West Virginia's redesignation request and determined that upon approval of the base year emissions inventory in the separate rulemaking action noted previously, it would meet the redesignation criteria set forth in section 107(d)(3)(E) of the CAA. EPA believes that the monitoring data demonstrate that the Parkersburg-Marietta Area attains the 1997 annual $PM_{2.5}$ NAAQS and will continue to attain the standard. Final approval of this redesignation request would change the designation of the West Virginia portion of the Area from nonattainment to attainment for the 1997 annual $PM_{2.5}$ NAAQS. EPA is also proposing to approve the associated maintenance plan for the West Virginia portion of the Area, submitted on March 5, 2012, as a revision to the West Virginia SIP because it meets the requirements of CAA section 175A as described previously in this notice. EPA is also proposing to approve the insignificance determination for on-road motor vehicle contribution of $PM_{2.5}$, NO_X, and SO_2 submitted by WVDEP for the West Virginia portion of the Area in conjunction with its redesignation request. As noted previously, the 30-day public comment period for the proposed insignificance determination started on November 5, 2012 and will end on December 5, 2012. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

IX. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule proposing approval of West Virginia's redesignation request, maintenance plan, and transportation conformity insignificance determination for the Parkersburg-Marietta Area for the 1997 annual $PM_{2.5}$ NAAQS does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen oxides, $PM_{2.5}$, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

40 CFR Part 81

Air pollution control, National parks, Wilderness Areas.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: November 27, 2012.

W. C. Early,

Acting, Regional Administrator, Region III.

[FR Doc. 2012–29865 Filed 12–10–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R02–OAR–2012–0840, FRL–9761–7]

Approval and Promulgation of Implementation Plans; New Jersey and New York Ozone Attainment Demonstrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing action on the ozone attainment demonstration portion of comprehensive State Implementation Plan revisions submitted by New Jersey and New York to meet Clean Air Act requirements for attaining the 1997 8-hour ozone national ambient air quality standard. EPA is proposing to approve New Jersey's and New York's demonstration of attainment of the 1997 8-hour ozone standard as they relate to their portions of three moderate nonattainment areas; the New York-Northern New Jersey-Long Island, NY–NJ–CT area, the Philadelphia-

Wilmington-Atlantic City, PA–NJ–MD–DE area, and the Poughkeepsie area.

DATES: Comments must be received on or before January 10, 2013.

ADDRESSES: Submit your comments, identified by Docket ID number EPA–R02–OAR–2012–0840, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: Werner.Raymond@epa.gov.*
- *Fax:* 212–637–3901.
- *Mail:* Raymond Werner, Chief, Air Programs Branch, Environmental Protection Agency, Region 2 Office, 290 Broadway, 25th Floor, New York, New York 10007–1866.
- *Hand Delivery:* Raymond Werner, Chief, Air Programs Branch, Environmental Protection Agency, Region 2 Office, 290 Broadway, 25th Floor, New York, New York 10007–1866. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30 excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R02–OAR–2012–0840. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or email. The www.regulations.gov Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through www.regulations.gov your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 2 Office, Air Programs Branch, 290 Broadway, 25th Floor, New York, New York 10007–1866. EPA requests, if at all possible, that you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Robert F. Kelly, Air Programs Branch, Environmental Protection Agency, 290 Broadway, 25th Floor, New York, New York 10007–1866. The telephone number is (212) 637–3709. Mr. Kelly can also be reached via electronic mail at *kelly.bob@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, wherever ''Agency,'' ''we,'' ''us,'' or ''our'' is used, we mean the EPA.

Table of Contents

I. What action is EPA proposing?

The Environmental Protection Agency (EPA) is proposing action on the ozone attainment demonstration portion of comprehensive State Implementation Plan (SIP) revisions submitted by New Jersey and New York to meet Clean Air Act (Act or CAA) requirements for attaining the 0.08 parts per million (ppm) 8-hour ozone national ambient air quality standards (NAAQS or standard).[1] EPA is proposing to approve New Jersey's and New York's SIP revisions which demonstrate attainment of the 1997 8-hour ozone standard as they relate to their portions of three moderate nonattainment areas:

- The New York-Northern New Jersey-Long Island, NY-NJ-CT area, also called the New York City Metropolitan area,
- The Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE area, also called the Philadelphia area, and
- The Poughkeepsie area.

The EPA is proposing to approve New Jersey's and New York's 8-hour ozone attainment demonstration SIP revisions because the EPA has determined that the New York City Metropolitan, Philadelphia, and Poughkeepsie moderate nonattainment areas have attained the ozone NAAQS by their respective attainment deadlines. This proposed determination is based on complete quality assured and certified ambient air monitoring data from 2007 to 2011 that show the area has monitored attainment of the 1997 8-hour ozone NAAQS during this monitoring period.

II. What is the background for EPA's proposed action?

A. History and Time Frame of New Jersey and New York Attainment Demonstration SIPs

In 1997, EPA revised the health-based NAAQS for ozone, setting it at 0.08 ppm averaged over an 8-hour time frame. EPA set the 8-hour ozone standard based on scientific evidence demonstrating that ozone causes adverse health effects at lower ozone concentrations and over longer periods of time than was understood when the pre-existing 1-hour ozone standard was set. EPA determined that the 8-hour standard would be more protective of human health, especially with regard to children and adults who are active outdoors, and individuals with a pre-existing respiratory disease, such as asthma.

On April 30, 2004 (69 FR 23858), EPA finalized its attainment/nonattainment designations for areas across the country with respect to the 8-hour ozone standard. These actions became effective on June 15, 2004. Among those

[1] Unless otherwise specifically noted in the action, references to the 8-hour ozone standard are to the 0.08 ppm ozone standard promulgated in 1997.

nonattainment areas are the New York City Metropolitan area, the Philadelphia Area and the Poughkeepsie area. The New York City Metropolitan nonattainment area is composed of: the Bergen, Essex, Hudson, Hunterdon, Middlesex, Monmouth, Morris, Passaic, Somerset, Sussex, Union, and Warren Counties in New Jersey; the Bronx, Kings, Nassau, New York, Queens, Richmond, Rockland, Suffolk, and Westchester Counties in New York; and the Fairfield, Middlesex and New Haven Counties in Connecticut. The Philadelphia Area includes the entire State of Delaware; Cecil County in Maryland; Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Mercer, Ocean, and Salem Counties in New Jersey; and Bucks, Chester, Delaware, Montgomery, and Philadelphia Counties in Pennsylvania. The Poughkeepsie nonattainment area includes Dutchess, Orange and Putnam Counties in New York. See 40 CFR 81.307, 81.308, 81.321, 81.331, 81.333, and 81.339.

Also, on April 30, 2004 (69 FR 23951), EPA promulgated the Phase 1 8-hour ozone Implementation Rule which provided how areas designated nonattainment for the 1997 8-hour ozone standard would be classified. These designations triggered the Act's requirements under section 182(b) for moderate nonattainment areas, including a requirement to submit an attainment demonstration. EPA's Phase 2 8-hour ozone implementation rule, published on November 29, 2005 (70 FR 71612) (Phase 2 Rule) specifies that states must submit attainment demonstrations for their nonattainment areas to the EPA by no later than three years from the effective date of designation, that is, by June 15, 2007. 40 CFR 51.908(a).

Although the focus of this proposed rulemaking action is on the attainment demonstrations for the 1997 8-hour ozone standard, we note that EPA has subsequently revised the ozone standard. On March 12, 2008, EPA revised both the primary and secondary NAAQS for ozone to a level of 0.075 ppm (annual fourth-highest daily maximum 8-hour average concentration, averaged over 3 years) to provide increased protection of public health and the environment.[2] The 2008 ozone NAAQS retain the same general form and averaging time as the 0.08 ppm NAAQS set in 1997, but are set at a more protective level. State emission reduction efforts already underway to meet the 1997 8-hour ozone standard will continue with implementation of the 2008 ozone NAAQS.

B. Moderate Area Requirements

EPA's November 29, 2005 Phase 2 Rule addresses, among other things, the control obligations that apply to areas designated nonattainment for the 1997 8-hour NAAQS. The Phase 1 and Phase 2 Rules outline the SIP requirements and deadlines for various requirements in areas designated as moderate nonattainment. For such areas, modeling and attainment demonstrations with projection year emission inventories were due by June 15, 2007, along with reasonable further progress plans, reasonably available control technology (RACT), reasonably available control measures (RACM), motor vehicle emissions budgets and contingency measures (40 CFR 51.908(a), and (c) 59.910, 59.912). This proposed action addresses New Jersey's and New York's demonstration of attainment of the 1997 8-hour ozone standard. Moderate areas are required to attain the 1997 8-hour ozone NAAQS by no later than six years after designation, or June 15, 2010. See 40 CFR 51.903. In order to demonstrate attainment by June 2010, the area must adopt and implement all controls necessary for attainment by the beginning of the 2009 ozone season and demonstrate that the level of the standard will be met during the 2009 ozone season. The Philadelphia Area qualified for a one-year extension of its attainment date, based on the complete, certified ambient air quality data for the 2009 ozone season. On January 21, 2011, EPA approved a one-year extension of the Philadelphia Area's attainment date, from June 15, 2010 to June 15, 2011. See 76 FR 3838 and 76 FR 3840.

III. What was included in New Jersey's and New York's proposed SIP submittals?

A. New Jersey's SIP Submittal and EPA's Actions

After completing the appropriate public notice and comment procedures, New Jersey made a series of submittals in order to address the Act's 8-hour ozone attainment requirements. On August 1, 2007, New Jersey submitted its RACT rules, which included a determination that many of the RACT rules currently contained in its SIP meet the RACT obligation for the 8-hour standard, and also included commitments to adopt revisions to several regulations where the State identified more stringent emission limitations that it believed should be considered RACT. On October 29, 2007, New Jersey submitted to EPA a comprehensive 8-hour ozone SIP to address the Act's 8-hour ozone attainment requirements for the New Jersey portions of the New York City Metropolitan and the Philadelphia nonattainment areas. New Jersey's proposed SIP included, among other elements, attainment demonstrations, reasonable further progress (RFP) plans for 2008 and 2009, reasonably available control measures analyses for both areas, contingency measures, on-road motor vehicle emission budgets, and general conformity emission budgets. Finally, as part of the RACT evaluation, on December 14, 2007, New Jersey submitted to EPA an assessment of how it planned to address EPA's revised Control Technique Guidelines. New Jersey's attainment demonstration SIP revisions are the only subject of this proposed rulemaking.

EPA has taken several actions on New Jersey's SIP revisions to address the requirements of the 1997 8-hour ozone standard:

- On July 17, 2008 (73 FR 41068), EPA made a finding that the motor vehicle emissions budgets for the New Jersey portions of the New York City Metropolitan area and the Philadelphia area associated with the respective reasonable further progress and attainment demonstrations are adequate for transportation conformity purposes.
- On May 15, 2009 (74 FR 22837), EPA approved the RFP plans, RFP contingency measures, and RACM analyses from New Jersey.
- On August 3, 2010 (75 FR 45483) and on December 22, 2010 (75 FR 80340), EPA approved SIP revisions for numerous statewide RACT rules to control emissions from sources of volatile organic compounds, nitrogen oxides, particulate matter and sulfur dioxide to address the RACT requirements for the 1997 8-hour ozone standard.

New Jersey has submitted all required SIP revisions to address the 1997 8-hour ozone standard, and has implemented all of the emission control measures, including contingency measures, contained in these SIP revisions. EPA's approval of these SIP revisions, in combination with this proposed rulemaking action to approve the attainment demonstrations will serve to completely address New Jersey's requirements under the 1997 8-hour ozone standard.

B. New York's SIP Submittal and EPA's Actions

After completing the appropriate public notice and comment procedures,

[2] See 73 FR 16436; March 27, 2008. For a detailed explanation of the calculation of the 3-year 8-hour average, see 40 CFR part 50, Appendix I.

New York made a series of submittals in order to address the Act's 8-hour ozone attainment requirements. On September 1, 2006, New York submitted its statewide 8-hour ozone RACT SIP, which included a determination that many of the RACT rules currently contained in its SIP meet the RACT obligation for the 8-hour standard and also included commitments to adopt revisions to several regulations where the State identified more stringent emission limitations that it believed should now be considered RACT. On February 8, 2008, New York submitted two comprehensive 8-hour ozone SIPs—one for the New York City Metropolitan area, entitled, ''New York SIP for Ozone—Attainment Demonstration for New York Metro Area'' and one for the Poughkeepsie nonattainment area, entitled, ''New York SIP for Ozone—Attainment Demonstration for Poughkeepsie, NY Area.'' On December 28, 2009 and January 26, 2011, New York supplemented its February 8, 2008 submittal. The submittals included the 2002 base year emissions inventory, projection year emissions, attainment demonstrations, RFP plans, RACM analysis, RACT analysis, contingency measures and on-road motor vehicle emission budgets. New York's attainment demonstration SIP revisions are the only subjects of this proposed rulemaking.

EPA has taken several actions on New York's SIP revisions to address the requirements of the 1997 8-hour ozone standard:

- On May 28, 2010 (75 FR 29897), EPA approved SIP revisions for several of New York's RACT rules for emissions of volatile organic compounds to address the RACT requirements for the 1997 8-hour ozone standard.
- On July 13, 2010 (75 FR 43066), EPA conditionally approved New York's 8-hour ozone statewide RACT analysis and the 8-hour ozone RACM analysis for the New York City Metropolitan area. The condition was that New York submits to EPA the RACT rules committed to in New York's RACT plan, which ultimately New York did submit.
- On August 2, 2010 (75 FR 45057), EPA made the finding that the motor vehicle emissions budgets for the New York portions of the New York City Metropolitan area and the Poughkeepsie area associated with the respective reasonable further progress and attainment demonstrations are adequate for transportation conformity purposes.
- On August 18, 2011 (76 FR 51264), EPA approved the 2002 statewide base year emissions inventory and the projection year emissions, the motor vehicle emissions budgets used for planning purposes, the reasonable further progress plan, and the contingency measures as they relate to the New York City Metropolitan area.
- On March 8, 2012 (77 FR 13974), EPA approved SIP revisions for several of New York's RACT rules for emissions of volatile organic compounds to address the conditional approval of New York's RACT plan to meet the requirements for the 1997 8-hour ozone standard.

New York has submitted all required SIP revisions to address the 1997 8-hour ozone standard, and has implemented all of the emission control measures, including contingency measures, contained in these SIP revisions. EPA's approval of these SIP revisions, in combination with this proposed rulemaking action to approve the attainment demonstrations for the 1997 8-hour ozone standard will serve to completely address New York's requirements under the 1997 8-hour ozone standard.

IV. What is EPA's basis for proposing to approve the attainment demonstrations?

A. Air Quality Data and Attainment Determinations

With respect to the New York City Metropolitan, Philadelphia, and Poughkeepsie areas, EPA has evaluated the ambient air quality monitoring data and has determined that all three areas attained the 8-hour ozone standard by the required attainment date.

In a June 18, 2012 **Federal Register** notice (77 FR 36163), EPA made several determinations, including two determinations regarding the 1997 8-hour ozone NAAQS for the New York City Metropolitan moderate nonattainment area. (Note EPA published a technical correction to the June 18, 2012 action on August 9, 2012 (77 FR 47533)). First, EPA made a clean data determination that the New York City Metropolitan area had attained the 1997 8-hour ozone NAAQS. This determination was based upon complete, quality assured and certified ambient air monitoring data that showed the New York City Metropolitan area had monitored attainment of the 1997 8-hour ozone NAAQS for the 2007–2009 and 2008–2010 monitoring periods. Ambient air monitoring data for the 2009–2011 monitoring period is consistent with continued attainment. Second, pursuant to section 181(b)(2)(A) of the CAA, EPA made a determination of attainment that the New York City Metropolitan area had attained the 1997 8-hour ozone NAAQS by its attainment date of June 15, 2010.

In a March 26, 2012 **Federal Register** notice (77 FR 17341), EPA made two determinations regarding the 1997 8-hour ozone NAAQS for the Philadelphia moderate nonattainment area. First, EPA made a clean data determination that the Philadelphia area had attained the 1997 8-hour ozone NAAQS. This determination was based upon complete, quality assured and certified ambient air monitoring data that showed the Philadelphia area had monitored attainment of the 1997 8-hour ozone NAAQS for the 2008–2010 monitoring period. Ambient air monitoring data for the 2009–2011 monitoring period is consistent with continued attainment. Second, pursuant to section 181(b)(2)(A) of the CAA, EPA made a determination of attainment that the Philadelphia area had attained the 1997 8-hour ozone NAAQS by its attainment date of June 15, 2011.

On December 7, 2009 (74 FR 63993), EPA made a clean data determination for the Poughkeepsie area and announced the attainment determination in the **Federal Register**. The clean data determinations were based on 2006–2008 quality-assured and certified ozone monitoring data for the Poughkeepsie area. Based on complete, quality-assured and certified ozone monitoring data since the 2006–2008 monitoring period, the Poughkeepsie area continues to show attainment through 2011, and with preliminary ozone data through 2012.

While not required, New Jersey and New York requested EPA to make these determinations in certain circumstances. New Jersey requested EPA to make a determination that the New York City Metropolitan area attained the 8-hour ozone NAAQS in a letter dated January 19, 2011. New York requested EPA to make determinations that the New York City Metropolitan area and the Poughkeepsie area have attained the 8-hour ozone NAAQS in letters dated June 16, 2011 and July 30, 2009, respectively. Copies of these rulemakings containing the determinations of attainment and the clean data determinations are included in the Docket (EPA–R02–OAR–2012–0840) and available at *www.regulations.gov.* The reader is referred to these other rulemakings for additional information regarding all of the complete, quality-assured and certified ozone monitoring data which served as the basis for these determinations.

EPA is aware that preliminary ambient air quality monitoring data for 2012 may indicate that the New York City Metropolitan and Philadelphia areas are no longer attaining the 1997 8-

hour ozone NAAQS, while the Poughkeepsie area continues to attain the 8-hour ozone NAAQS. However, 2012 monitoring data is not relevant to this proposed rulemaking on SIP revisions which demonstrate how the states met their plan to attain the 1997 8-hour ozone standard by the June 15, 2010 attainment date (June 15, 2011 for the Philadelphia area). Based on data through 2011, these areas are attaining the 1997 8-hour ozone NAAQS. EPA has a continuing obligation to review the air quality data each year to determine whether areas are meeting the NAAQS and will continue to conduct that review in the future after data is complete, quality-assured, certified and submitted to EPA.

Lastly, pursuant to 40 CFR 51.918, these determinations suspend the requirements for various SIP items, including, the requirement to submit an attainment demonstration, an RFP plan, and section 172(c)(9) contingency measures for the eight-hour ozone NAAQS for so long as the area continues to attain the ozone NAAQS. However, section 110(k)(2) of the CAA requires EPA to take action on any administratively complete SIP revision submittal within 12 months of the SIP being deemed complete. Therefore, while the clean data determinations suspend the state's obligation to submit the attainment demonstration SIP revision, the determinations do not suspend EPA's obligation to take action on the SIP revision if it has been submitted by the state and deemed to be complete. EPA was sued by Sierra Club to take final action on these particular attainment demonstration SIP revisions ((see Sierra Club v. Jackson, Civil Action No. 11–2180–RBW) (D.D.C.)). EPA is proposing to take such final action in this notice. The proposed rulemaking is intended to address EPA's obligations.

B. Components of the Modeled Attainment Demonstrations

Section 110(a)(2)(k) of the Act requires states to prepare air quality modeling to demonstrate how they will meet ambient air quality standards. EPA determined that states must use photochemical grid modeling, or any other analytical method determined by the Administrator to be at least as effective, to demonstrate attainment of the ozone health-based standard in areas classified as ''moderate'' or above, and to do so by the required attainment date. See 40 CFR 51.908(c). EPA requires an approvable attainment demonstration, showing that attainment will occur by the attainment deadline, using air quality modeling that meets EPA's guidelines and a 'weight of evidence' analysis that uses a variety of information to determine if the results of the modeling analysis are supported by supplemental information or need to be modified.

New Jersey submitted an attainment demonstration for the New York City Metropolitan and Philadelphia areas that included a modeling analysis and a two-part weight of evidence analysis, which the State said would result in attainment by the attainment date. The modeling analysis predicted continued nonattainment by 2009. The first part of the weight of evidence analysis included adjustments to the modeling results to account for model bias. The second part of the weight of evidence analysis included an evaluation of additional factors that would support a conclusion that attainment will be reached by 2009, despite the conclusion of the adjusted modeling analysis that predicted continued nonattainment by 2009.

New York submitted an attainment demonstration for the New York City Metropolitan and Poughkeepsie areas that included a modeling analysis and a weight of evidence analysis. With respect to the New York City Metropolitan area, New York's modeling analysis predicted continued nonattainment by 2009. Based on the measured ozone levels at the time (2007), New York did not support a weight of evidence conclusion that attainment will be reached by 2009. With respect to the Poughkeepsie area, New York's modeling analysis predicted attainment by 2009.

EPA determined that the photochemical grid modeling conducted by the states was consistent with EPA's guidelines and the model performed acceptably. Taking into account that EPA made clean data determinations and determinations of attainment of the 1997 8-hour ozone NAAQS attainment date for the New York City Metropolitan, Philadelphia and Poughkeepsie areas, EPA is proposing to approve New Jersey's and New York's demonstrations of attainment of the 1997 8-hour ozone standard for these three moderate nonattainment areas.

In addition, as noted earlier, EPA has already approved the RFP plans for the New York City Metropolitan and Philadelphia areas. Given the fact that these areas attained the ozone standard by the attainment date suggests that the RFP plans may have been sufficient for the moderate nonattainment areas to reach attainment. These RFP plans contained corresponding emission control measures and the states developed and adopted additional control measures to ensure attainment of the ozone standard by the attainment date. All of the control measures that were relied on for attainment and contained in the RFP plans were submitted as SIP revisions and approved by EPA. Therefore, the demonstration of attainment for the New York City Metropolitan, Philadelphia and Poughkeepsie areas in New Jersey and New York SIPs are approvable because New Jersey and New York each adopted all of the control measures in its ozone plans.

C. EPA's Evaluation

In summary, the basic photochemical grid modeling used by New Jersey and New York in its SIP submittal meets EPA's guidelines and, when used with the methods recommended in EPA's modeling guidance, is acceptable to EPA. Air quality data through 2011 supports the states' conclusions that the areas will demonstrate attainment of the 8-hour ozone standard by the attainment date. The purpose of the attainment demonstration is to show how the areas will meet the standard by the attainment date. All the control measures included in the attainment demonstration SIPs have already been adopted, submitted, approved and implemented. Based on (1) the states following EPA's modeling guidance, (2) the air quality data through 2011, (3) the areas attaining the standard by the attainment date, and (4) the implemented SIP approved control measures, EPA is proposing to approve the New Jersey and New York attainment demonstration SIP revisions.

V. What is EPA's conclusion?

EPA has evaluated New Jersey's and New York's submittals for consistency with the Act, EPA regulations, and EPA policy. EPA has evaluated the information provided by New Jersey and New York and has considered all other information it deems relevant to attainment of the 1997 8-hour ozone standard, i.e., clean data determinations, determinations that these areas attained the standard by the applicable attainment date, statewide RACT analysis approval, reasonable further progress plan approvals (including all applicable control strategy regulations), continued attainment of the 1997 8-hour ozone standard based on quality assured and certified monitoring data, and the implementation of the more stringent 2008 8-hour ozone standard. EPA is therefore proposing to approve the attainment demonstrations for the New York City Metropolitan, Philadelphia and Poughkeepsie 1997 8-hour ozone moderate nonattainment areas.

VI. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 et seq.

Dated: November 26, 2012.

Judith Enck,

Regional Administrator, Region 2.

[FR Doc. 2012–29896 Filed 12–10–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R03–OAR–2012–0368; FRL–9761–6]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Redesignation of the West Virginia Portion of the Wheeling, WV–OH 1997 Annual Fine Particulate Matter ($PM_{2.5}$) Nonattainment Area to Attainment and Approval of the Associated Maintenance Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a redesignation request and State Implementation Plan (SIP) revision submitted by the State of West Virginia. The West Virginia Department of Environmental Protection (WVDEP) is requesting that the West Virginia portion of the Wheeling, WV–OH fine particulate matter ($PM_{2.5}$) nonattainment area (''Wheeling Area'' or ''Area'') be redesignated as attainment for the 1997 annual $PM_{2.5}$ national ambient air quality standard (NAAQS). The Wheeling Area is comprised of Marshall and Ohio Counties in West Virginia and Belmont County in Ohio. In conjunction with its redesignation request, West Virginia submitted a SIP revision consisting of a maintenance plan for the West Virginia portion of the Area that provides for continued attainment of the 1997 annual $PM_{2.5}$ NAAQS for at least 10 years after redesignation. The maintenance plan includes the 2005 base year emissions inventory that EPA is proposing to approve in this rulemaking in accordance with the requirements of the Clean Air Act (CAA). The maintenance plan also includes an insignificance determination for the onroad motor vehicle contribution of $PM_{2.5}$, nitrogen oxides (NO_X) and sulfur dioxide (SO_2) for the West Virginia portion of the Area. It should be noted that EPA has already initiated a comment period on the proposed insignificance determination for the West Virginia portion of the Area on the Web site for the Office of Transportation and Air Quality (OTAQ) to allow for a 30-day review of this proposed insignificance determination in conjunction with this proposed rulemaking.[1] EPA is proposing to find that West Virginia's insignificance determination for transportation conformity is adequate. EPA previously determined that the West Virginia portion of the Wheeling Area has attained the 1997 annual $PM_{2.5}$ NAAQS, and EPA is proposing to find that the Area continues to attain the standard. This action to propose approval of the 1997 annual $PM_{2.5}$ NAAQS redesignation request, the maintenance plan, the 2005 base year emissions inventory, and insignificance determination for transportation conformity for the West Virginia portion of the Area is based on EPA's determination that the Area has met the criteria for redesignation to attainment specified in the CAA. EPA is taking separate action to propose redesignation for the Ohio portion of the Wheeling Area.

DATES: Written comments must be received on or before January 10, 2013.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2012–0368 by one of the following methods:

A. *www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *Email: mastro.donna@epa.gov.*

C. *Mail:* EPA–R03–OAR–2012–0368, Donna Mastro, Acting Associate Director, Office of Air Quality Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2012–0368. EPA's policy is that all comments

[1] On November 5, 2012, EPA initiated the comment period for this proposed insignificance determination on the Office of Transportation and Air Quality (OTAQ) Web site (*http://www.epa.gov/otaq/stateresources/transconf/currsips.htm*) in order to allow for a full 30 day public comment period in conjunction with this proposed rulemaking.

received will be included in the public docket without change, and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov*, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the West Virginia Department of Environmental Protection, Division of Air Quality, 601 57th Street SE., Charleston, West Virginia 24304.

FOR FURTHER INFORMATION CONTACT: Rose Quinto, (215) 814–2182, or by email at *quinto.rose@epa.gov*.

SUPPLEMENTARY INFORMATION:

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I. Summary of Actions

On March 8, 2012, the State of West Virginia through WVEP formally submitted a request to redesignate the West Virginia portion of the Area from nonattainment to attainment of the 1997 annual $PM_{2.5}$ NAAQS. Concurrently, WVDEP submitted a maintenance plan for the Area as a SIP revision to ensure continued attainment throughout the Area over the next 10 years.

EPA is proposing to take several actions related to the redesignation of the West Virginia portion of the Area to attainment for the 1997 annual $PM_{2.5}$ NAAQS. EPA is proposing to find that the West Virginia portion of the Area meets the requirements for redesignation for the 1997 annual $PM_{2.5}$ NAAQS under section 107(d)(3)(E) of the CAA. EPA is thus proposing to approve West Virginia's request to change the legal definition of its portion of the Area from nonattainment to attainment for the 1997 annual $PM_{2.5}$ NAAQS. This action does not impact the legal definition of the Ohio portion of the Area. EPA is taking separate action to redesignate the Ohio portion.

EPA is also proposing to approve the maintenance plan for the West Virginia portion of the Area as a revision to the West Virginia SIP. Such approval is one of the CAA criteria for redesignation of an area to attainment. The maintenance plan is designed to ensure continued attainment in the West Virginia portion of the Area for 10 years after redesignation. The maintenance plan includes an insignificance determination for the onroad motor vehicle contribution for $PM_{2.5}$, SO_2 and NO_X in the West Virginia portion of the Area for transportation conformity purposes. EPA has determined that the onroad motor vehicle insignificance finding that is included as part of West Virginia's maintenance plan for the 1997 annual $PM_{2.5}$ NAAQS is adequate, and is proposing to approve the insignificance determination. Furthermore, under section 172(c)(3) of the CAA, EPA is proposing to approve the 2005 base year emissions inventory for the West Virginia portion of the Area as part of West Virginia's maintenance plan for the 1997 annual $PM_{2.5}$ NAAQS. EPA's analysis for these proposed actions is discussed in Sections VI and VII of today's proposed rulemaking action.

II. Background

A. General

The first air quality standards for $PM_{2.5}$ were established on July 18, 1997 (62 FR 38652). EPA promulgated an annual standard at a level of 15 micrograms per cubic meter ($\mu g/m^3$), based on a three-year average of annual mean $PM_{2.5}$ concentrations. In the same rulemaking, EPA promulgated a 24-hour standard of 65 $\mu g/m^3$ based on a three-year average of the 98th percentile of 24-hour concentrations. On October 17, 2006 (71 FR 61144), EPA retained the annual average standard at 15 $\mu g/m^3$ but revised the 24-hour standard to 35 $\mu g/m^3$, based again on the three-year average of the 98th percentile of the 24-hour concentrations.

On January 5, 2005 (70 FR 944), as supplemented on April 14, 2005 (70 FR 19844), EPA designated the Wheeling Area as nonattainment for the 1997 $PM_{2.5}$ NAAQS. The Wheeling Area is comprised of Marshall and Ohio Counties in West Virginia and Belmont County in Ohio. On November 13, 2009 (74 FR 58688), EPA promulgated designations for the 24-hour standard established in 2006, designating the Wheeling Area as attaining this standard. In that action, EPA also clarified the designations for the NAAQS promulgated in 1997, stating that the Wheeling Area remained designated nonattainment for the 1997 annual $PM_{2.5}$ NAAQS, but was designated attainment for the 1997 24-hour NAAQS. Today's action therefore, does not address attainment of either the 1997 or the 2006 24-hour $PM_{2.5}$ NAAQS.

In response to legal challenges of the annual standard promulgated in 2006, the United States Court of Appeals for the District of Columbia Circuit (the Court) remanded the 2006 annual standard to EPA for further consideration. *See American Farm Bureau Federation and National Pork Producers Council, et. al.* v. *EPA,* 559 F.3d 512 (D.C. Cir. 2009). However, given that the 1997 and 2006 annual standards are essentially identical, attainment of the 1997 annual standard would also indicate attainment of the remanded 2006 annual standard. Since the Area is designated nonattainment for the annual standard promulgated in 1997, today's action addresses redesignation to attainment only for this standard.

In the final rulemaking action dated December 2, 2011 (76 FR 75464), EPA determined, pursuant to CAA section 179(c), that the entire Wheeling Area is attaining the 1997 annual $PM_{2.5}$ NAAQS. This determination of attainment was based upon complete, quality-assured and certified ambient air quality monitoring data for the period of 2007–2009 showing that the Area had attained the 1997 annual $PM_{2.5}$ NAAQS by its applicable attainment date of April 5, 2010.

B. Clean Air Interstate Rule (CAIR) and Cross State Air Pollution Rule (CSAPR or the Transport Rule)

On May 12, 2005, EPA published CAIR, which requires significant reductions in emissions of SO_2 and NO_X from electric generating units (EGUs) to limit the interstate transport of these pollutants and the ozone and $PM_{2.5}$ they form in the atmosphere. *See* 70 FR 25162. The Court initially vacated CAIR, *North Carolina* v. *EPA,* 531 F.3d 896 (D.C. Cir. 2008), but ultimately remanded the rule to EPA without vacatur to preserve the environmental benefits provided by CAIR. *North Carolina* v. *EPA,* 550 F.3d 1176, 1178 (D.C. Cir. 2008). In response to the Court's decision, EPA issued the Transport Rule, also known as CSAPR, to address interstate transport of NO_X and SO_2 in the eastern United States. *See* 76 FR 48208 (August 8, 2011). On August 21, 2012, the Court issued a decision to vacate the Transport Rule. In that decision, it also ordered EPA to continue administering CAIR ''pending the promulgation of a valid replacement.'' *EME Homer City Generation, L.P.* v. *EPA,* No. 11–1302 (D.C. Cir., August 21, 2012).[2]

In light of these unique circumstances and for the reasons explained below, EPA proposes to approve the redesignation request and the related SIP revision for Marshall and Ohio Counties in West Virginia, including West Virginia's plan for maintaining attainment of the 1997 annual $PM_{2.5}$ NAAQS for the West Virginia portion of the Area. The air quality modeling analysis conducted for the Transport Rule demonstrates that the Wheeling Area would be able to attain the 1997 annual $PM_{2.5}$ NAAQS even in the absence of either CAIR or the Transport Rule. *See* ''*Air Quality Modeling Final Rule Technical Support Document,*'' Appendix B, B–115–B–134. This modeling is available in the docket for the Transport Rule rulemaking. *See* Docket ID. No. EPA–HQ–OAR–2009–0491. Nothing in the Court's August 2012 decision disturbs or calls into question that conclusion or the validity of the air quality analysis on which it is based.

In addition, CAIR remains in place and enforceable until substituted by a ''valid'' replacement rule. West Virginia's SIP revision lists CAIR as a control measure that became state-effective May 1, 2008 and was approved by EPA on August 4, 2009 (74 FR 38536) for the purpose of reducing SO_2 and NO_X emissions. The monitoring data used to demonstrate the Area's attainment of the 1997 annual $PM_{2.5}$ NAAQS by the April 2010 attainment deadline was also impacted by CAIR. To the extent that West Virginia is relying on CAIR in its maintenance plan, the recent directive from the Court in *EME Homer City* ensures that the reductions associated with CAIR will be permanent and enforceable for the necessary time period. EPA has been ordered by the Court to develop a new rule, and the opinion makes clear that after promulgating that new rule, EPA must provide states an opportunity to draft and submit SIPs to implement that rule. CAIR thus cannot be replaced until EPA has promulgated a final rule through a notice-and-comment rulemaking process, states have had an opportunity to draft and submit SIPs, EPA has reviewed the SIPs to determine if they can be approved, and EPA has taken action on the SIPs, including promulgating a FIP if appropriate. These steps alone will take many years, even with EPA and the states acting expeditiously. The Court's clear instruction to EPA that it must continue to administer CAIR until a ''valid replacement'' exists provides an additional backstop; by definition, any rule that replaces CAIR and meets the Court's direction would require upwind states to have SIPs that eliminate significant downwind contributions.

Further, in vacating the Transport Rule and requiring EPA to continue administering CAIR, the Court emphasized that the consequences of vacating CAIR ''might be more severe now in light of the reliance interests accumulated over the intervening four years.'' *EME Homer City,* slip op. at 60. The accumulated reliance interests include the interests of states who reasonably assumed they could rely on reductions associated with CAIR which brought certain nonattainment areas into attainment with the NAAQS. If EPA were prevented from relying on reductions associated with CAIR in redesignation actions, states would be forced to impose additional, redundant reductions on top of those achieved by CAIR. EPA believes this is precisely the type of irrational result the Court sought to avoid by ordering EPA to continue administering CAIR. For these reasons also, EPA believes it is appropriate to allow states to rely on CAIR, and the existing emissions reductions achieved by CAIR, as sufficiently permanent and enforceable pending a valid replacement rule for purposes such as redesignation. Following promulgation of the replacement rule, EPA will review SIPs as appropriate to identify whether there are any issues that need to be addressed.

III. Criteria for Redesignation to Attainment

The CAA provides the requirements for redesignating a nonattainment area to attainment. Specifically, section 107(d)(3)(E) of the CAA allows for redesignation providing that: (1) EPA determines that the area has attained the applicable NAAQS; (2) EPA has fully approved the applicable implementation plan for the area under section 110(k) of the CAA; (3) EPA determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable SIP and applicable Federal air pollutant control regulations and other permanent and enforceable reductions; (4) EPA has fully approved a maintenance plan for the area as meeting the requirements of section 175A of the CAA; and (5) the state containing such area has met all requirements applicable to the area under section 110 and part D of the CAA.

EPA has provided guidance on redesignation in the General Preamble for the Implementation of Title I of the CAA Amendments of 1990 (57 FR 13498, April 16, 1992) (supplemented at 57 FR 18070, April 28, 1992) and has provided further guidance on processing redesignation requests in the following documents:

1. ''Procedures for Processing Requests to Redesignate Areas to Attainment,'' Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992 (hereafter referred to as the ''Calcagni Memorandum'');

2. ''State Implementation Plan (SIP) Actions Submitted in Response to Clean Air Act (CAA) Deadlines,'' Memorandum from John Calcagni, Director, Air Quality Management Division, October 28, 1992; and

3. ''Part D New Source Review (Part D NSR) Requirements for Areas Requesting Redesignation to Attainment,'' Memorandum from Mary

[2] The Court's judgment is not final, as of November 16, 2012, as the mandate has not yet been issued.

D. Nichols, Assistant Administrator for Air and Radiation, October 14, 1994.

IV. Reasons for Proposing These Actions

On March 8, 2012, the WVDEP requested redesignation of the West Virginia portion of the Area to attainment for the 1997 annual $PM_{2.5}$ NAAQS. As part of the redesignation request, WVDEP submitted a maintenance plan for the West Virginia portion of the Area as a SIP revision, to ensure continued attainment of the 1997 annual $PM_{2.5}$ NAAQS over the next 10 years until 2022. EPA has determined that the Wheeling Area has attained the 1997 annual $PM_{2.5}$ NAAQS and has met the requirements set forth in CAA section 107(d)(3)(E) for redesignation of the West Virginia portion of the Area.

V. Effects of EPA's Proposed Actions

Final approval of the redesignation request would change the official designation of the West Virginia portion of Area for the 1997 annual $PM_{2.5}$ NAAQS, found at 40 CFR part 81, from nonattainment to attainment. It would incorporate into the West Virginia SIP a maintenance plan ensuring continued attainment of the 1997 annual $PM_{2.5}$ NAAQS in the Area for the next 10 years until 2022. The maintenance plan includes, among other components, contingency measures to remedy any future violations of the 1997 annual $PM_{2.5}$ NAAQS (should they occur). Approval of the maintenance plan would also result in approval of the insignificance determination for $PM_{2.5}$, SO_2 and NOx for transportation conformity purposes for the years 2015 and 2022 in the West Virginia portion of the Area. Approval of the 2005 base year emissions inventory, which is part of the maintenance plan, will satisfy the inventory requirements under section 172(c)(3) of the CAA.

VI. Analysis of West Virginia's Redesignation Request

EPA proposes to redesignate the West Virginia portion of the Area to attainment for the 1997 annual $PM_{2.5}$ NAAQS and to approve into the West Virginia SIP the 1997 annual $PM_{2.5}$ NAAQS maintenance plan for the West Virginia portion of the Area. These actions are based upon EPA's determination that the Area continues to attain the 1997 annual $PM_{2.5}$ NAAQS and that all other redesignation criteria have been met for the West Virginia portion of the Area, provided EPA approves the 2005 base year emissions inventory that is being proposed in this rulemaking. The following is a description of how the WVDEP March 8, 2012 submittal satisfies the requirements of section 107(d)(3)(E) of the CAA.

1. Attainment

As noted above, in a final rulemaking action dated December 2, 2011 (76 FR 75464), EPA determined, pursuant to CAA section 179(c), that the entire Wheeling Area was attaining the 1997 annual $PM_{2.5}$ NAAQS. This determination of attainment was based upon complete, quality-assured and certified ambient air quality monitoring data for the period of 2007–2009 showing that the Area had attained the NAAQS by its applicable attainment date of April 5, 2010. Further discussion of pertinent air quality issues underlying this determination was provided in the notice of proposed rulemaking for EPA's determination of attainment for this Area, published on July 21, 2011 (76 FR 43634). EPA has reviewed more recent data in its Air Quality System (AQS) database, including certified, quality-assured data for the period from 2008–2010 and 2009–2011. This data shown in Table 1, shows that the Wheeling Area continues to attain the 1997 annual $PM_{2.5}$ NAAQS. In addition, as discussed below with respect to the maintenance plan, WVDEP has committed to continue monitoring air quality in accordance with 40 CFR part 58. In summary, EPA has determined that the data submitted by West Virginia, as well as data taken from AQS, indicate that the Wheeling Area has attained and continues to attain the 1997 annual $PM_{2.5}$ NAAQS.

TABLE 1—DESIGN VALUE CONCENTRATIONS FOR THE WEST VIRGINIA PORTION OF THE WHEELING AREA FOR THE 1997 ANNUAL $PM_{2.5}$ NAAQS ($\mu g/M^3$) FOR 2008–2010 AND 2009–2011

County	Monitor ID	3-Year Annual Design Values	
		2008–2010	2009–2011
Marshall, WV	54–051–1002	13.1	13.0
Ohio, WV	54–069–0010	12.4	11.9

Note: There is no monitor in Belmont County, Ohio.

2. The Area Has Met All Applicable Requirements Under Section 110 and Part D of the CAA and Has a Fully Approved SIP Under Section 110(k) of the CAA

EPA has determined that the West Virginia portion of the Area has met all SIP requirements applicable for purposes of this redesignation under section 110 of the CAA (General SIP Requirements) and that, upon final approval of the 2005 base year emissions inventory, as discussed below in this proposed rulemaking, it will have met all applicable SIP requirements under part D of Title I of the CAA, in accordance with CAA section 107(d)(3)(E)(v). In addition, EPA is proposing to find that all applicable requirements of the West Virginia SIP for purposes of redesignation have been approved in accordance with CAA section 107(d)(3)(E)(ii). In making these proposed determinations, EPA ascertained which SIP requirements are applicable for purposes of redesignation of this Area, and concluded that the applicable portions of the SIP meeting these requirements are fully approved under section 110(k) of the CAA. EPA notes that SIPs must be fully approved only with respect to applicable requirements.

a. Section 110 General SIP Requirements

Section 110(a)(2) of Title I of the CAA delineates the general requirements for a SIP, which include enforceable emissions limitations and other control measures, means, or techniques, provisions for the establishment and operation of appropriate devices necessary to collect data on ambient air quality, and programs to enforce the limitations. The general SIP elements and requirements set forth in CAA section 110(a)(2) include, but are not limited to the following:

- Submittal of a SIP that has been adopted by the state after reasonable public notice and hearing;

- Provisions for establishment and operation of appropriate procedures needed to monitor ambient air quality;
- Implementation of a source permit program; provisions for the implementation of Part C requirements (Prevention of Significant Deterioration (PSD));
- Provisions for the implementation of Part D requirements for New Source Review (NSR) permit programs;
- Provisions for air pollution modeling; and
- Provisions for public and local agency participation in planning and emission control rule development.

Section 110(a)(2)(D) of the CAA requires that SIPs contain certain measures to prevent sources in a state from significantly contributing to air quality problems in another state. To implement this provision, EPA has required certain states to establish programs to address the interstate transport of air pollutants in accordance with the NO_X SIP Call, October 27, 1998 (63 FR 57356), amendments to the NO_X SIP Call, May 14, 1999 (64 FR 26298) and March 2, 2000 (65 FR 11222), and CAIR, May 12, 2005 (70 FR 25162). However, the CAA section 110(a)(2)(D) requirements for a state are not linked with a particular nonattainment area's designation and classification in that state. EPA believes that the requirements linked with a particular nonattainment area's designation and classifications are the relevant measures to evaluate in reviewing a redesignation request. The transport SIP submittal requirements, where applicable, continue to apply to a state regardless of the designation of any one particular area in the state. Thus, EPA does not believe that these requirements are applicable requirements for purposes of redesignation.

In addition, EPA believes that the other CAA section 110(a)(2) elements not connected with nonattainment plan submissions and not linked with an area's attainment status are not applicable requirements for purposes of redesignation. The Area will still be subject to these requirements after it is redesignated. EPA concludes that the CAA section 110(a)(2) and Part D requirements which are linked with a particular area's designation and classification are the relevant measures to evaluate in reviewing a redesignation request, and that CAA section 110(a)(2) elements not linked in the area's nonattainment status are not applicable for purposes of redesignation. This approach is consistent with EPA's existing policy on applicability of conformity (i.e., for redesignations) and oxygenated fuels requirement. *See* Reading, Pennsylvania, proposed and final rulemakings (61 FR 53174, October 10, 1996), (62 FR 24826, May 7, 1997); Cleveland-Akron-Lorain, Ohio final rulemaking (61 FR 20458, May 7, 1996); and Tampa, Florida final rulemaking (60 FR 62748, December 7, 1995). *See also* the discussion on this issue in the Cincinnati, Ohio redesignation (65 FR at 37890, June 19, 2000) and in the Pittsburgh, Pennsylvania redesignation (66 FR at 53099, October 19, 2001).

EPA has reviewed the West Virginia SIP and has concluded that it meets the general SIP requirements under section 110(a)(2) of the CAA to the extent they are applicable for purposes of redesignation. EPA has previously approved provisions of West Virginia's SIP addressing CAA section 110(a)(2) requirements, including provisions addressing $PM_{2.5}$. *See* 76 FR 47062 (August 4, 2011). These requirements are, however, statewide requirements that are not linked to the $PM_{2.5}$ nonattainment status of the Wheeling Area. Therefore, EPA believes that these SIP elements are not applicable requirements for purposes of review of West Virginia's $PM_{2.5}$ redesignation request.

b. Part D Nonattainment Requirements Under the Standard

Subpart 1 of part D, sections 172 to 175 of the CAA, sets forth the basic nonattainment plan requirements applicable to $PM_{2.5}$ nonattainment areas. Under CAA section 172, states with nonattainment areas must submit plans providing for timely attainment and meet a variety of other requirements. On November 20, 2009 (74 FR 60199), EPA made a determination that the Wheeling Area is attaining the 1997 annual $PM_{2.5}$ NAAQS. This determination was based upon complete, quality-assured, quality controlled, and certified ambient air monitoring data that show that the area monitored attainment of the 1997 annual $PM_{2.5}$ NAAQS during the 2006–2008 monitoring period. Available monitoring data for 2009, 2010 and 2011 are consistent with continued attainment of the standard. Pursuant to 40 CFR 51.2004(c), upon determination by EPA that an area designated nonattainment of the $PM_{2.5}$ NAAQS has attained the standard, the requirement for such an area to submit an attainment demonstration and associated reasonably achievable control technology (RACT)/reasonably achievable control measures (RACM), a reasonable further progress (RFP), contingency measures, and other planning SIPs related to the attainment of the $PM_{2.5}$ NAAQS are suspended until the area is redesignated to attainment or EPA determines that the area has again violated the $PM_{2.5}$ NAAQS, at which time such plans are required to be submitted. As a result of the determination of attainment, the only remaining requirement under CAA section 172 to be considered is the emissions inventory required under CAA section 172(c)(3).

In this rulemaking action, EPA is proposing to approve West Virginia's 2005 base year emissions inventory in accordance with section 172(c)(3) of the CAA. Final approval of the 2005 base year emissions inventory will satisfy the emissions inventory requirement under section 172(c)(3) of the CAA.

The General Preamble for Implementation of Title I also discusses the evaluation of these requirements in the context of EPA's consideration of a redesignation request. The General Preamble sets forth EPA's view of applicable requirements for purposes of evaluating redesignation requests when an area is attaining the standard. *See* General Preamble for Implementation of Title I (57 FR 13498, April 16, 1992).

Because attainment has been reached for the Area, no additional measures are needed to provide for attainment, and CAA section 172(c)(1) requirements for an attainment demonstration and RACT/RACM are no longer considered to be applicable for purposes of redesignation as long as the area continues to attain the standard until redesignation. *See* 40 CFR 51.1004(c). The RFP requirement under CAA section 172(c)(2) and contingency measures requirement under CAA section 172(c)(9) are similarly not relevant for purposes of redesignation.

Section 172(c)(3) of the CAA requires submission and approval of a comprehensive, accurate and current inventory of actual emissions. As part of the maintenance plan submitted by WVDEP, West Virginia submitted a 2005 base year emissions inventory that meets this requirement. The 2005 base year emissions inventory compiled by WVDEP for the West Virginia portion of the Area contains $PM_{2.5}$ (including condensables), SO_2 and NO_X emissions. The emissions cover the general source categories of point sources, area sources, onroad mobile sources and nonroad mobile sources. The proposed approval of the 2005 base year emissions inventory in this rulemaking action will, when finalized, meet the requirements of CAA section 172(c)(3). For more information on the evaluation and EPA's analysis of the 2005 base year emissions inventory, *see* Appendix B of the State submittal and the emissions inventory technical support document (TSD) dated May 18, 2012, available on

line at *www.regulations.gov*, Docket ID No. EPA–OAR–R03–2012–0368. A summary of the 2005 base year emissions inventory is shown in Tables 2 and 3.

TABLE 2—MARSHALL COUNTY, WEST VIRGINIA, SUMMARY OF 2005 BASE YEAR EMISSIONS INVENTORY IN TONS PER YEAR (TPY)

	SO_2	NO_X	$PM_{2.5}$
Point (EGU)	96,378	31,541	3,826
Non EGU	19,110	3,131	525
Area	102	184	316
Locomotive & Marine (LM)	31	671	25
Nonroad	10	113	12
Onroad	9	735	26
Total	115,641	36,375	4,731

TABLE 3—OHIO COUNTY, WEST VIRGINIA, SUMMARY OF 2005 BASE YEAR EMISSIONS INVENTORY IN TPY

	SO_2	NO_X	$PM_{2.5}$
Point (EGU)	0	0	0
Non EGU	1	6	11
Area	232	613	263
Locomotive & Marine (LM)	44	972	38
Nonroad	15	170	21
Onroad	16	1230	40
Total	308	2991	372

Section 172(c)(4) of the CAA requires the identification and quantification of allowable emissions for major new and modified stationary sources in an area, and CAA section 172(c)(5) requires source permits for the construction and operation of new and modified major stationary sources anywhere in the nonattainment area. EPA has determined that, since the PSD requirements will apply after redesignation, areas being redesignated need not comply with the requirement that a nonattainment NSR program be approved prior to redesignation, provided that the area demonstrates maintenance of the NAAQS without part D NSR. A more detailed rationale for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation, dated October 14, 1994 entitled, ''*Part D New Source Review Requirements for Areas Requesting Redesignation to Attainment.*'' Nevertheless, West Virginia currently has an approved NSR program, codified in 45 CFR 19. *See* 71 FR 64468 (November 2, 2006) (approving NSR program into the SIP). *See also* 77 FR 63736 (October 17, 2012) (approving revisions to West Virginia's PSD program). However, West Virginia's PSD program for the 1997 annual $PM_{2.5}$ NAAQS will become effective in the Wheeling Area upon redesignation to attainment.

Section 172(c)(6) of the CAA requires the SIP to contain control measures necessary to provide for attainment of the NAAQS. Because attainment has been reached for the Area, no additional measures are needed to provide for attainment.

Section 172(c)(7) of the CAA requires the SIP to meet the applicable provisions of CAA section 110(a)(2). As noted previously, we believe the West Virginia SIP meets the requirements of CAA section 110(a)(2) that are applicable for purposes of redesignation.

Section 176(c) of the CAA requires states to establish criteria and procedures to ensure that Federally supported or funded projects conform to the air quality planning goals in the applicable SIP. The requirement to determine conformity applies to transportation plans, programs, and projects developed, funded or approved under Title 23 of the United States Code (U.S.C.) and the Federal Transit Act (transportation conformity) as well as to all other Federally supported or funded projects (general conformity). State transportation conformity SIP revisions must be consistent with Federal conformity regulations relating to consultation, enforcement and enforceability which EPA promulgated pursuant to its authority under the CAA.

EPA interprets the conformity SIP requirements as not applying for purposes of evaluating the redesignation request under CAA section 107(d) because state conformity rules are still required after redesignation and Federal conformity rules apply where state rules have not been approved. *See Wall* v. *EPA,* 265 F.3d 426, (6th Cir. 2001) (upholding this interpretation). *See also* 60 FR 62748 (December 7, 1995) (discussing Tampa, Florida). Thus, EPA determines that the Wheeling Area has satisfied all applicable requirements for purposes of redesignation under CAA section 110, and upon final approval of the 2005 base year emissions inventory, will have satisfied all applicable requirements under part D of Title I of the CAA.

c. The West Virginia Portion of the Area Has a Fully Approved Applicable SIP Under Section 110(k) of the CAA

Upon final approval of the 2005 base year emissions inventory, EPA will have fully approved the West Virginia portion of the Area under section 110(k) of the CAA for all requirements applicable for purposes of redesignaton to attainment for the 1997 annual $PM_{2.5}$ NAAQS. As noted above, in this rulemaking action, EPA is proposing to approve the West Virginia portion of the Area's 2005 base year emissions inventory (submitted as part of its maintenance plan) as meeting the requirement of section 172(c)(3) of the CAA for the 1997 annual $PM_{2.5}$ NAAQS. Therefore, upon final approval of the 2005 base year emissions inventory,

EPA will have satisfied all applicable requirements under part D of Title I of the CAA for the West Virginia portion of the Area.

3. The Air Quality Improvement in the West Virginia Portion of the Area Is Due to Permanent and Enforceable Reductions in Emissions Resulting From Implementation of the SIP and Applicable Federal Air Pollution Control Regulations and Other Permanent and Enforceable Reductions

For redesignating a nonattainment area to attainment, CAA section 107(d)(3)(E)(iii) requires EPA to determine that the air quality improvement in the area is due to permanent and enforceable reductions in emissions resulting from implementation of the SIP and applicable Federal air pollution control regulations and other permanent and enforceable reductions. EPA believes that West Virginia has demonstrated that the observed air quality improvement in the West Virginia portion of the Area is due to permanent and enforceable reductions in emissions resulting from implementation of the SIP, Federal measures, and other state-adopted measures. In making this demonstration, West Virginia has calculated the change in emissions between 2005, one of the years used to designate the Wheeling Area as nonattainment, and 2008, one of the years the Wheeling Area monitored attainment. *See* Table 4 below. The reduction in emissions and the corresponding improvement in air quality over this time period can be attributed to a number of regulatory control measures that the Wheeling Area and contributing areas have implemented in recent years.

TABLE 4—COMPARISON OF 2005 BASE YEAR AND 2008 ATTAINMENT YEAR REDUCTIONS IN TPY IN THE WHEELING AREA

	2005	2008	Decrease
EGU NO_X	35,691	27,437	8,254
EGU $PM_{2.5}$	3,920	4,510	(590)
EGU SO_2	133,708	50,200	83,508
Onroad NO_X	5,145	4,272	873
Onroad $PM_{2.5}$	172	145	27
Onroad SO_2	56	18	38
Nonroad NO_X	505	463	42
Nonroad $PM_{2.5}$	60	54	6
Nonroad SO_2	47	13	34

a. Federal Measures Implemented

Reductions in $PM_{2.5}$ precursor emissions have occurred statewide and in upwind states as a result of Federal emission control measures with additional emission reductions expected to occur in the future. Federal emission control measures include the following:

(1) Tier 2 Emission Standards for Vehicles and Gasoline Sulfur Standards

These emission control requirements result in lower NO_X and SO_2 emissions from new cars and light duty trucks, including sport utility vehicles. The Federal rules were phased in between 2004 and 2009. EPA has estimated that, after phasing in the new requirements, new vehicles emit less NO_X in the following percentages: Passenger cars (light duty vehicles)—77 percent; light duty trucks, minivans, and sports utility vehicles—86 percent; and larger sports utility vehicles, vans, and heavier trucks—69–95 percent. EPA expects fleet wide average emissions to decline by similar percentages as new vehicles replace older vehicles. The Tier 2 standards also reduced the sulfur content of gasoline to 30 parts per million (ppm) beginning in January 2006, which reflects up to a 90 percent reduction in sulfur content.

(2) Heavy-Duty Diesel Engine Rule

EPA issued this rule in July 2000. This rule includes standards limiting the sulfur content of diesel fuel, which went into effect in 2004. A second phase took effect in 2007 which reduced $PM_{2.5}$ emissions from heavy-duty highway engines and further reduced the highway diesel fuel sulfur content to 15 ppm. The total program is estimated to achieve a 90 percent reduction in direct $PM_{2.5}$ emissions and a 95 percent reduction in NO_X emissions for these new engines using low sulfur diesel, compared to existing engines using higher sulfur diesel fuel. The reduction in fuel sulfur content also yielded an immediate reduction in particulate sulfate emissions from all diesel vehicles.

(3) Nonroad Diesel Rule

In May 2004, EPA promulgated a new rule for large nonroad diesel engines, such as those used in construction, agriculture, and mining, to be phased in between 2008 and 2014. The rule also reduces the sulfur content in nonroad diesel fuel by over 99 percent. Prior to 2006, nonroad diesel fuel averaged approximately 3,400 ppm sulfur. This rule limited nonroad diesel sulfur content to 500 ppm by 2006, with a further reduction to 15 ppm by 2010.

b. Controls on $PM_{2.5}$ Precursors

The Area's air quality is strongly affected by regulation of SO_2 and NO_X from power plants. EPA promulgated the NO_X SIP Call, CAIR and CASPR to address SO_2 and NO_X emissions from EGUs and certain non-EGUs across the eastern United States. The affected EGUs in the Wheeling Area are located at the Ohio Power Mitchell Plant and the Ohio Power Kammer Plant in Marshall County which are both owned and/or operated by American Electric Power (AEP).

(1) NO_X SIP Call

EPA issued the NO_X SIP Call in 1998 pursuant to the CAA to require 22 states and the District of Columbia to reduce NO_X emissions from large EGUs and large non-EGUs such as industrial boilers, internal combustion engines, and cement kilns. (63 FR 57356, October 27, 1998). EPA approved West Virginia's Phase I NO_X SIP Call rule in 2002 and Phase II rule in 2006. Emission reductions resulting from regulations developed in response to the NO_X SIP Call are permanent and enforceable.

(2) CAIR and CSAPR

EPA approved West Virginia's CAIR rules in 2009 (74 FR 38536, August 4, 2009)). The maintenance plan for the West Virginia portion of the Area thus lists CAIR as a control measure for the purpose of reducing SO_2 and NO_X emissions from EGUs.

As previously discussed, the Court's 2008 remand of CAIR left the rule in place to ''temporarily preserve the environmental values covered by CAIR'' until EPA replaced it with a rule consistent with the Court's opinion, and

the Court's August 2012 decision on the Transport Rule also left CAIR in effect until the legal challenges to the Transport Rule are resolved. As noted, EPA believes it is appropriate to allow states to rely on CAIR, and the existing emissions reductions achieved by CAIR, as sufficiently permanent and enforceable pending a valid replacement rule, for purposes such as redesignation.

Furthermore, as previously discussed, the air quality modeling analysis conducted for the Transport Rule demonstrates that the Wheeling Area would be able to attain the 1997 annual $PM_{2.5}$ NAAQS even in the absence of either CAIR or the Transport Rule. EPA's modeling projections show that all ambient monitors in the Area are expected to continue to maintain compliance in the 2012 and 2014 ''no CAIR'' base cases. Therefore, none of the ambient monitoring sites in the Wheeling Area are ''receptors'' that EPA projects will have future nonattainment problems or difficulty maintaining the NAAQS.

c. Federal Consent Decrees

EGUs in this Area are subject to Federal consent decrees that have reduced emissions of NO_X and SO_2 in the Area. There are two EGUs in Marshall County, the partial county portion of the West Virginia portion of the Area. These are the Ohio Power Kammer Plant and Ohio Power Mitchell Plant in Marshall County which are owned and/or operated by AEP. As part of a Federally enforceable consent decree with AEP, the Mitchell Plant was required, starting in January 2009, to operate selective catalytic reduction (SCR) continuously to control emissions of NO_X and to operate continuously its Flue Gas Desulfurization (FGD) to reduce SO_2 emissions starting in December 2007.

d. Controls on $PM_{2.5}$ Precursors From EGUs in the Area

Since 2008, additional controls have and will be installed on EGUs within the West Virginia portion of the Area and the State of Ohio, which will continue to contribute to the reductions in precursor pollutants for $PM_{2.5}$. The Mitchell Plant installed and began operation of SCR to control NO_X emissions on Units 1 and 2 starting in January 2009, and the Kammer Plant may be required to retire, retrofit, or repower Units 1–3 by December 31, 2018. EGUs in Belmont County, Ohio have installed controls as a result of a Federally enforceable consent decree. In 2008, two units, #4 and #5 at the R.E. Burger First Energy station installed selective non-catalytic reduction (SNCR) to reduce NO_X emissions. Both units are required by 2012 to operate the SNCR continuously to reduce NO_X emissions.

e. Controls on $PM_{2.5}$ Precursors From EGUs in Contributing States

Because $PM_{2.5}$ concentrations in the Wheeling Area are impacted by the transport of sulfates and nitrates, the Area's air quality is strongly affected by regulation of SO_2 and NO_X emissions from EGUs in states in the region that significantly contribute to the Area. EPA reviewed SO_2 and NO_X emissions from EGUs in states that contribute to the Area, and the data show that SO_2 and NO_X emissions have been decreasing. *See* EPA's Air Markets Program Database (AMPD) [3] (*http://ampd.epa.gov/ampd*).

Based on the information summarized above, West Virginia has adequately demonstrated that the improvement in air quality is due to permanent and enforceable emissions reductions. The reductions result from Federal requirements, regulation of precursors under the NO_X SIP Call and CAIR, and consent decrees affecting EGUs in the Wheeling Area, which are expected to continue into the future.

4. The West Virginia Portion of the Area Has a Fully Approvable Maintenance Plan Pursuant to Section 175A of the CAA

In conjunction with its request to redesignate the West Virginia portion of the Area to attainment status, West Virginia submitted a SIP revision to provide for maintenance of the 1997 annual $PM_{2.5}$ NAAQS in the Area for at least 10 years after redesignation. West Virginia is requesting that EPA approve this SIP revision as meeting the requirements of section 175A of the CAA. Once approved, the maintenance plan for the West Virginia portion of the Area will ensure that the SIP for West Virginia meets the requirements of the CAA regarding maintenance of the 1997 annual $PM_{2.5}$ NAAQS for this Area.

a. Requirements of a Maintenance Plan

Section 175 of the CAA sets forth the elements of a maintenance plan for areas seeking redesignation from nonattainment to attainment. Under CAA section 175A, the plan must demonstrate continued attainment of the applicable NAAQS for at least 10 years after approval of a redesignation of an area to attainment. Eight years after the redesignation, West Virginia must submit a revised maintenance plan demonstrating that attainment will continue to be maintained for the 10 years following the initial 10-year period. To address the possibility of future NAAQS violations, the maintenance plan must contain such contingency measures, with a schedule for implementation, as EPA deems necessary, to assure prompt correction of any future 1997 annual $PM_{2.5}$ violations. The Calcagni Memorandum dated September 4, 1992 provides additional guidance on the content of a maintenance plan. The Calcagni Memorandum states that a $PM_{2.5}$ maintenance plan should address the following provisions: (1) An attainment emissions inventory; (2) a maintenance demonstration showing maintenance for 10 years; (3) a commitment to maintain the existing monitoring network; (4) verification of continued attainment; and (5) a contingency plan to prevent or correct future violations of the NAAQS.

b. Analysis of the Maintenance Plan

(1) Attainment Emissions Inventory

An attainment inventory is comprised of the emissions during the time period associated with the monitoring data showing attainment. WVDEP developed emissions inventories for NO_X, direct $PM_{2.5}$, and SO_2 for 2008, one of the years in the period during which the Wheeling Area monitored attainment of the 1997 annual $PM_{2.5}$ standard, as described previously. The 2008 point source inventory contained emissions for EGUs and non-EGU sources in Marshall and Ohio Counties in West Virginia. WVDEP used the 2008 annual emissions inventory submitted to EPA's National Emissions Inventory (NEI) database and EPA's AMPD database to compile their inventory. For the 2008 area source emissions, WVDEP used the 2008 NEI v1.5 data developed by EPA. For the 2008 nonroad mobile sources, WVDEP generated the emissions using EPA's NONROAD model. The 2008 onroad mobile source inventory was developed using the most current version of EPA's highway mobile source emissions model MOVES2010a. WVDEP used the Kentucky, Ohio, and West Virginia (KYOVA) Travel Demand Model, which is the most recent travel demand model provided by the KYOVA Interstate Planning Commission that covers the nonattainment counties in West Virginia. Information from the travel demand model combined with Highway Performance Monitoring Systems (HPMS) county-level data from each area were used in the emissions analysis.

Additional data needed for input into the MOVES2010a model was provided by the Ohio Department of

[3] Formerly, the Clean Air Markets Division (CAMD) database.

Transportation (ODOT), Ohio EPA, West Virginia Department of Transportation (WVDOT), WVDEP, Kentucky Transportation Cabinet (KYTC), and the Kentucky Division of Air Quality (KDAQ).

(2) Maintenance Demonstration

On March 8, 2012, WVDEP submitted its maintenance plan for the West Virginia portion of the Area as required by section 175A of the CAA. WVDEP uses projection inventories to show that the Area will remain in attainment and developed projection inventories for an interim year of 2015 and a maintenance plan end year of 2022 to show that future emissions of NO_X, SO_2, and direct $PM_{2.5}$ will remain at or below the attainment year 2008 emissions levels throughout the West Virginia portion of the Area through the year 2022. A maintenance demonstration need not be based on modeling. *See Wall* v. *EPA, supra; Sierra Club* v. *EPA, supra. See also* 66 FR at 53099–53100; 68 FR at 25430–32. The projection inventories for the 2015 and 2022 point, area, and nonroad sources were based on the 2012 and 2018 Visibility Improvement State and Tribal Association of the Southeast (VISTAS)/Association of Southeastern Integrated Planning (ASIP) modeling inventory.

West Virginia developed the 2015 point source inventory by interpolation between VISTAS/ASIP 2012 and 2018 modeling inventory. The 2022 EGU inventory for $PM_{2.5}$, NO_X, and SO_2 was kept the same as the VISTAS/ASIP 2018 inventory. The 2022 non-EGU inventory was extrapolated from the 2012 and 2018 inventory. Point source emissions for 2012 and 2018 were developed for EGUs and non-EGUs. For EGUs, WVDEP used the projection inventory developed by VISTAS/ASIP. VISTAS/ASIP analysis was based on EPA's Integrated Planning Model (IPM). The VISTAS/ASIP analysis projected future year emissions for EGUs under several scenarios based on the best information available at the time of the analysis. WVDEP used the ''on the way'' (OTW) projections, which took into account the reductions required by CAIR, as a basis for 2012 and 2018 EGU emissions. VISTAS/ASIP used EPA's Economic Growth Analysis System (EGAS), Version 4.0 to make the projections for non-EGUs, incorporating the growth factors suggested in the reports entitled, ''Development of Growth Factors for Future Year Modeling Inventories (April 30, 2004)'' and ''CAIR Emission Inventory Overview (July 23, 2004).'' EPA has reviewed the documentation provided by WVDEP and found the methodologies acceptable.

Area source emissions for 2015 were interpolated from the VISTAS/ASIP 2012 and 2018 inventories. The 2022 emissions were extrapolated from the VISTAS/ASIP 2012 and 2018 inventories. Growth and controls for emissions were based on the methodologies applied by EPA for the CAIR analysis. Nonroad source emissions, including aircraft, locomotives, and commercial marine vessels (CMV) for 2015 were interpolated from the VISTAS/ASIP 2012 and 2018 inventories. CMV source emissions from SO_2 included in the 2022 inventory were held constant at 2018 levels because no further reduction in fuel sulfur content is expected. All other nonroad source emissions for 2022 were extrapolated from the VISTAS/ASIP 2012 and 2018 inventories. The 2015 and 2022 onroad mobile source emissions were prepared using MOVES2010a following the same procedure as the 2008 inventory as described previously.

EPA has determined that the emissions inventories discussed above as provided by WVDEP are approvable. For more information on EPA's evaluation and analysis of the emissions inventory, *see* Appendix B of the State submittal and the May 18, 2012 TSD, available on line at *www.regulations.gov*, Docket ID No. EPA–OAR–R03–2012–0368. Table 5 below shows the inventories for the 2008 attainment year, the 2015 interim year, and the 2022 maintenance plan end year for the entire Area.

TABLE 5—COMPARISON OF 2008, 2015, AND 2022 SO_2, NO_X, AND DIRECT $PM_{2.5}$ EMISSION TOTALS FOR THE WHEELING NONATTAINMENT AREA WV–OH (in Tpy)

	SO_2	NO_X	$PM_{2.5}$
2008 (attainment)	67,103	35,971	6,001
2015 (interim)	36,843	16,204	3,436
2015 (projected decrease)	30,260	19,767	2,565
2022 (maintenance)	31,487	15,390	3,472
2022 (projected decrease)	35,616	20,581	2,529

Table 5 shows that between 2008 and 2015, the entire Wheeling Area is projected to reduce SO_2 emissions by 30,260 tpy, NO_X emissions by 19,767 tpy, and direct $PM_{2.5}$ emissions by 2,565 tpy. Between 2008 and 2022, the Area is projected to reduce SO_2 emissions by 35,616 tpy, NO_X emissions by 20,581 tpy, and direct $PM_{2.5}$ emissions by 2,529 tpy. Thus, the projected emissions inventories show that the Area will continue to maintain the 1997 annual $PM_{2.5}$ NAAQS during the 10 year maintenance period.

(3) Maintenance Demonstration Through 2023

As noted in Section VI.4.a of this document, CAA section 175A requires a state seeking redesignation to attainment to submit a SIP revision to provide for the maintenance of the NAAQS in the area ''for at least 10 years after the redesignation.'' EPA has interpreted this as a showing of maintenance ''for a period of 10 years following redesignation.'' September 4, 1992 Calcagni Memorandum at p.9. Where the emissions inventory method of showing maintenance is used, its purpose is to show that emissions during the maintenance period will not increase over the attainment year inventory. *See* Calcagni Memorandum at pp.9–10.

As discussed in detail above, the State's maintenance plan submission expressly documents that the Area's emissions inventories will remain below the attainment year inventories through at least 2022. In addition, for the reasons set forth below, EPA believes that the State's submission, in conjunction with additional supporting information, further demonstrates that the Area will continue to maintain the 1997 annual $PM_{2.5}$ NAAQS at least through 2023:

- Significant emissions controls will remain in place and will continue to provide reductions that will keep the Area in attainment. As part of a Federally enforceable consent decree with AEP, the Ohio Power Mitchell Plant in Marshall County was required starting in January 2009 to operate its SCR continuously to control emissions of NO_X and to operate continuously its

FDG to reduce SO_2 starting in December 2007. In addition, AEP is required by the Federally enforceable consent decree to retire, retrofit, or repower additional units such as Kammer Units 1–3 by the end of December 2018.

• West Virginia has committed to maintain all of the control measures upon which West Virginia relies in its March 8, 2012 submittal and will submit any changes to EPA for approval as a SIP revision.

• Emissions inventory levels for SO_2 and NO_X in 2022 are well below the attainment year inventory levels (*see* Table 5), and EPA believes that it is highly improbable that sudden increases would occur that could exceed the attainment year inventory levels in 2023.

• The mobile source contribution has been determined to be insignificant and is expected to remain insignificant in 2023 with fleet turnover in upcoming years that will result in cleaner vehicles and cleaner fuels.

• Air quality concentrations which are well below the standard, coupled with the emissions inventory projections through 2022, demonstrate that it would be very unlikely for a violation to occur in 2023. The 2009–2011 design value of 13.0 μg/m^3 provides a sufficient margin in the event of any emissions increase, and the design value reflects a continued downward trend in monitored data in the Area for the last several years.

Thus, even if EPA finalizes its proposed approval of the redesignation request and maintenance plan in 2013, EPA's approval is based on a showing, in accordance with CAA section 175A, that West Virginia's maintenance plan provides for maintenance for at least 10 years after redesignation and clearly into 2023.

(4) Monitoring Network

EPA has determined that West Virginia's maintenance plan includes a commitment to continue to operate its EPA-approved monitoring network, as necessary to demonstrate ongoing compliance with the NAAQS. West Virginia currently operates two $PM_{2.5}$ monitors in the Wheeling Area. One is located in Marshall County, and the other one is in Ohio County. In its March 8, 2012 submittal, West Virginia stated that it will consult with EPA prior to making any necessary changes to the network and will continue to quality assure the monitoring data in accordance with the requirements of 40 CFR part 58.

(5) Verification of Continued Attainment

To provide for tracking of the emission levels in the Area, WVDEP requires major point sources to submit air emissions information annually and prepares a new periodic inventory for all $PM_{2.5}$ precursors every three years in accordance with EPA's Air Emissions Reporting Requirements (AERR). EPA has determined that WVDEP will continue to compare emissions information to the attainment year inventory to assure continued attainment with the 1997 annual $PM_{2.5}$ NAAQS and that WVDEP will use this information to assess emissions trends, as necessary.

(6) The Maintenance Plan's Contingency Measures

The contingency plan provisions for maintenance plans are designed to promptly correct a violation of the NAAQS that occurs after redesignation. Section 175A of the CAA requires that a maintenance plan include such contingency measures as EPA deems necessary to ensure that a state will promptly correct a violation of the NAAQS that occurs after redesignation. The maintenance plan should identify the events that would ''trigger'' the adoption and implementation of a contingency measure(s), the contingency measure(s) that would be adopted and implemented, and the schedule indicating the time frame by which the state would adopt and implement the measure(s).

The ability of the West Virginia portion of the Area to stay in compliance with the 1997 annual $PM_{2.5}$ NAAQS after redesignation depends upon NO_X and SO_2 emissions in the Wheeling Area remaining at or below 2008 levels. West Virginia's maintenance plan projects NO_X and SO_2 emissions to decrease and stay below 2008 levels through at least the year 2022. West Virginia's maintenance plan outlines the procedures for the adoption and implementation of contingency measures to further reduce emissions should a violation occur.

West Virginia's contingency measures include a Warning Level Response and an Action Level Response. An initial Warning Level Response is triggered when the average weighted annual mean for a single calendar year exceeds 15.5 μg/m^3 within the maintenance area. In that case, a study will be conducted to determine if the emissions trends show increases; if action is necessary to reverse emissions increases, West Virginia will follow the same procedures for control selection and implementation as for an Action Level Response, and implementation of necessary controls will take place as expeditiously as possible, but no later than 12 months from the end of the most recent calendar year.

The Action Level Response will be prompted by any one of the following: A Warning Level Response study that shows emissions increases; a weighted annual mean over a two-year average that exceeds the standard; or a violation of the standard in the maintenance area. If an Action Level Response is triggered, West Virginia will adopt and implement appropriate control measures within 18 months from the end of the year in which monitored air quality triggering a response occurs. West Virginia will also consider whether additional regulations that are not a part of the maintenance plan can be implemented in a timely manner to respond to the trigger.

West Virginia's candidate contingency measures include the following: (1) Diesel reduction emission strategies, (2) alternative fuels and diesel retrofit programs for fleet vehicle operations, (3) $PM_{2.5}$, SO_2, and NO_X emissions offsets for new and modified major sources, (4) concrete manufacturing controls, and (5) additional NO_X reductions. Additionally, West Virginia has identified a list of sources that could potentially be controlled. These include: Industrial, commercial and institutional (ICI) Boilers for SO_2 and NO_X controls, EGUs, process heaters, internal combustion engines, combustion turbines, other sources greater than 100 tpy, fleet vehicles, concrete manufacturers, and aggregate processing plants. EPA finds that the West Virginia maintenance plan for the Wheeling Area includes appropriate contingency measures as necessary to ensure West Virginia will promptly correct any violation of the NAAQS that occurs after redesignation. For all of the reasons discussed above, EPA is proposing to approve West Virginia's 1997 annual $PM_{2.5}$ maintenance plan for the West Virginia portion of the Area as meeting the requirements of section 175A of the CAA.

VII. Analysis of West Virginia's Transportation Conformity Insignificance Determination for the Wheeling Area

Under section 176(c) of the CAA, new transportation projects, such as the construction of new highways, must ''conform'' to (i.e., be consistent with) the part of the state's air quality plan that addresses pollution from mobile sources. ''Conformity'' to the SIP means that transportation activities will not cause new air quality violations, worsen

existing violations, or delay timely attainment of a NAAQS or an interim milestone. This is typically determined by showing that estimated emissions from existing and planned highway and transit systems are less than or equal to the motor vehicle emissions budgets (MVEBs) contained in a SIP. If a transportation plan does not ''conform,'' most new projects that would expand the capacity of roadways cannot go forward. Regulations at 40 CFR part 93 set forth EPA policy, criteria, and procedures for demonstrating and ensuring conformity of such transportation activities to a SIP.

When reviewing submitted ''control strategy'' SIPs or maintenance plans containing MVEBs, EPA must affirmatively find the MVEBs contained therein ''adequate'' for use in determining transportation conformity. The process for determining adequacy is set forth in the guidance, ''*Transportation Conformity Rule Amendments* for the New $PM_{2.5}$ and $PM_{2.5}$ NAAQS and Miscellaneous Revisions of Existing Areas; Transportation Conformity Rule Amendments; Response to Court Decision and Additional Rule Changes.'' 69 FR 40004 (July 1, 2004). After EPA affirmatively finds the submitted MVEBs are adequate for transportation conformity purposes, in accordance with the guidance, the MVEBs can be used by state and Federal agencies in determining whether proposed transportation projects ''conform'' to the SIP as required by section 176(c) of the CAA.

For budgets to be approvable, they must meet, at a minimum, EPA's adequacy criteria in 40 CFR 93.118(e)(4). However, the transportation conformity rule at 40 CFR 93.109(f) allows areas to forego establishment of MVEBs where it is demonstrated that the regional motor vehicle emissions for a particular pollutant or precursor are an insignificant contributor to the air quality problem in an area. EPA's rationale for providing for insignificance determinations may be found in the July 1, 2004 revision to the Transportation Conformity Rule. The general criteria for insignificance determinations, per 40 CFR 93.109(f), are based on a number of factors, including the percentage of motor vehicle emissions in the context of the total SIP inventory; the current state of air quality as determined by monitoring data for the relevant NAAQS; the absence of SIP motor vehicle control measures; and the historical trends and future projections of the growth of motor vehicle emissions in the area.

In West Virginia's March 8, 2012 submittal, the State provided information that projects that onroad mobile source NO_X constitutes less than 12 and a half percent of the Area's total NO_X emissions in 2015 and 2022 due to continuing fleet turnover and that onroad mobile source $PM_{2.5}$ emissions constitute less than two and a half percent of the Area's total $PM_{2.5}$ emissions. Both projections took into consideration future vehicle miles traveled (VMT) growth. In addition, neither EPA nor the State has made any findings that volatile organic compounds (VOCs), SO_2, or ammonia (NH_3) are a significant contributor to $PM_{2.5}$ mobile emissions. Therefore, the March 8, 2012 submittal meets the criteria in the relevant portions of 40 CFR 93.102 and 93.118 for an insignificance finding, and EPA agrees with the determination of insignificance for SO_2, NO_X and $PM_{2.5}$ for the West Virginia portion of the Area. As previously discussed, EPA already initiated a comment period on November 5, 2012 on the proposed insignificance determination for the West Virginia portion of the Area on the OTAQ Web site to allow for a 30-day review of this proposed insignificance determination in conjunction with this proposed rulemaking. EPA is proposing to find that West Virginia's insignificance determination for transportation conformity is adequate. For more information on EPA's insignificance findings, see the TSD dated June 5, 2012, available on line at *www.regulations.gov,* Docket ID No. EPA–OAR–R03–2012–0368.

VIII. Proposed Actions

EPA is proposing to approve the redesignation of the West Virginia portion of the Area from nonattainment to attainment for the 1997 annual $PM_{2.5}$ NAAQS. EPA has evaluated West Virginia's redesignation request and determined that it meets the redesignation criteria set forth in section 107(d)(3)(E) of the CAA. EPA believes that the monitoring data demonstrate that the Wheeling Area has attained the 1997 annual $PM_{2.5}$ NAAQS and will continue to attain the standard. Final approval of this redesignation request would change the designation of the West Virginia portion of the Area from nonattainment to attainment for the 1997 p.m.$_{2.5}$ annual NAAQS. EPA is also proposing to approve the associated maintenance plan for the West Virginia portion of the Area submitted on March 8, 2012, as a revision to the West Virginia SIP because it meets the requirements of section 175A of the CAA as described previously in this notice. EPA is also proposing to approve the insignificance determination for onroad motor vehicle contribution of $PM_{2.5}$, NO_X and SO_2 submitted by the West Virginia portion of the Area in conjunction with West Virginia's redesignation request. As noted previously, EPA had already initiated a comment period on the proposed insignificance determination for the West Virginia portion of the Area in the OTAQ Web site (*http://www.epa.gov/otaq/stateresources/transconf/currsips.htm*) to allow for a 30-day review of this proposed determination in conjunction with this proposed rulemaking. The 30-day comment period started on November 5, 2012 and will end on December 5, 2012. In addition, as part of the maintenance plan, EPA is proposing to approve the 2005 base year emissions inventory as meeting the requirement in section 172(c)(3) of the CAA. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

IX. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule proposing to approve West Virginia's redesignation request, maintenance plan, 2005 base year emissions inventory, and transportation conformity insignificance determination for the Wheeling Area for the 1997 annual $PM_{2.5}$ NAAQS does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, $PM_{2.5}$, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

40 CFR Part 81

Air pollution control, National parks, Wilderness areas.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: November 21, 2012.

W.C. Early,

Acting Regional Administrator, Region III.

[FR Doc. 2012–29866 Filed 12–10–12; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[WC Docket No. 10–90; WT Docket No. 10–208; DA 12–1853]

Further Inquiry Into Issues Related to Mobility Fund Phase II

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Wireless Telecommunications Bureau and Wireline Competition Bureau (collectively, the Bureaus) seek further comment on specific issues relating to the implementation of Phase II of the Mobility Fund. The Bureaus also seek to develop a more comprehensive record on certain issues relating to the award of ongoing support for advanced mobile services.

DATES: Comments are due on or before December 21, 2012, and reply comments are due on or before January 7, 2013.

ADDRESSES: All filings in response to this public notice must refer to Docket Numbers 10–90 and 10–208. The Bureaus strongly encourage interested parties to file comments electronically. Comments may be submitted by any of the following methods:

▪ *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

▪ *Federal Communications Commission's Web Site: http://fjallfoss.fcc.gov/ecfs2/.* Follow the instructions for submitting comments.

▪ *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Attn: WTB/ASAD, Office of the Secretary, Federal Communications Commission.

▪ All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street SW., Room TW–A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

▪ Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

▪ *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

FOR FURTHER INFORMATION CONTACT: Sue McNeil, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau at (202) 418–0660.

SUPPLEMENTARY INFORMATION: This is a summary of the *Commission's Further Inquiry Into Issues Related to Mobility Fund Phase II* (*Mobility Fund Phase II Public Notice*) released on November 27, 2012. The complete text of the *Mobility Fund Phase II Public Notice,* as well as related Commission documents, is available for public inspection and copying from 8:00 a.m. to 4:30 p.m. Eastern Time (ET) Monday through Thursday or from 8:00 a.m. to 11:30 a.m. ET on Fridays in the FCC Reference Information Center, 445 12th Street SW., Room CY–A257, Washington, DC 20554. The *Mobility Fund Phase II Public Notice* and related Commission documents also may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), 445 12th Street SW., Room CY–B402, Washington, DC 20554, telephone 202–488–5300, fax 202–488–5563, or you may contact BCPI at its Web site: *http://www.BCPIWEB.com.* When ordering documents from BCPI, please provide the appropriate FCC document number, for example, DA 12–1853.

I. Introduction

1. The Bureaus seek further comment on a limited number of specific issues relating to the implementation of Phase II of the Mobility Fund. As established in the *USF/ICC Transformation Order and FNPRM,* 76 FC 78383, December 16, 2011, in Mobility Fund Phase II the Commission will award $500 million annually to ensure the availability of mobile broadband and high quality voice services in certain areas. Building on the comments previously filed in response to the *USF/ICC Transformation Order and FNPRM* and the Bureaus' experience in implementing a reverse auction to award one-time Phase I support, the Bureaus seek to develop a more comprehensive record on certain issues related to the award of ongoing support for advanced mobile services. In considering the issues related to Mobility Fund Phase II, the Bureaus ask commenters keep in mind that Phase II support is not one-time support, but is ongoing support aimed at expanding and sustaining mobile services.

II. Background

2. In the *USF/ICC Transformation Order and FNPRM,* the Commission comprehensively reformed and modernized the universal service high-cost program. Among other things, for the first time, the Commission explicitly recognized the important benefits of and demand for mobile services through the creation of a two-phase Mobility Fund within the high-cost program.

3. For Phase I, the Commission allocated $300 million in one-time

support to expand the availability of advanced mobile services, plus an additional $50 million dedicated to Tribal lands. For Phase II of the Mobility Fund, the Commission dedicated $500 million annually (including up to $100 million dedicated to Tribal lands) and proposed to make awards through a reverse auction to support providers of voice and mobile broadband service in areas where such services cannot be sustained or extended without ongoing support. The Commission further proposed to award support on the same terms and conditions as it adopted for Phase I, but sought comment on whether any modifications were needed to reflect the ongoing nature of support in Phase II.

4. Under the Commission's proposal, a Mobility Fund Phase II reverse auction would assign support to maximize coverage of unserved road miles (or other units) within the budget. To implement an auction, the Commission proposed a basic framework of auction rules that would give the Bureaus flexibility under delegated authority to establish specific procedures for a Mobility Fund Phase II auction.

III. Overall Design

A. Identifying Areas Eligible for Support

5. In the *USF/ICC Transformation Order and FNPRM,* the Commission sought comment on various issues associated with identifying the geographic areas that would be eligible for Phase II support. In light of experience with Mobility Fund Phase I and Auction 901, the Bureaus seek further comment on certain of these issues.

6. *Identifying Areas Eligible for Support.* To target Phase II support to only those areas where it is needed, the Commission proposed to use Mosaik Solutions (Mosaik) data to exclude all census blocks where an unsubsidized carrier is providing 3G or better service. For purposes of determining areas with unsubsidized service, the Commission proposed in the *USF/ICC Transformation Order and FNPRM* that areas receiving one-time Mobility Fund Phase I support would still be eligible to receive Mobility Fund Phase II support.

7. Some commenters express concern about the accuracy of the Mosaik database. The Bureaus now seek further comment based on the use of Mosaik data as a factor in determining eligible areas for Phase I support. To the extent that parties assert that Mosaik data inaccurately reflects the availability of service, the Bureaus seek comment on whether there are any other data sources that the Commission could use to better identify eligible areas. The Bureaus request that commenters provide specific information on what makes these alternate sources superior and how they could be used instead of, or in combination with, the Mosaik database. The Bureaus also seek comment on whether there are other factors the Commission should consider in addition to the availability of unsubsidized service. For instance, how should providers' planned expansion of unsubsidized service affect the identification of areas eligible for support? For example, in Mobility Fund Phase I, the Commission excluded areas from auction where a provider has made a regulatory commitment to provide 3G or better wireless service, or has received a funding commitment from a federal executive department or agency in response to the carrier's commitment to provide 3G or better service. In addition, the Commission required applicants for Mobility Fund Phase I support to certify that they were not seeking support for any areas in which they had made a public commitment to deploy 3G or better wireless service by December 31, 2012.

8. *Use of the Centroid Method.* In the *USF/ICC Transformation Order and FNPRM,* the Commission proposed to determine the eligibility of a particular census block for Phase II support based on the absence of unsubsidized 3G or better service at the centroid, which refers to the internal point latitude/longitude of a census block polygon. Some commenters expressed concern that the centroid method is an ineffective measure to determine whether large areas are unserved. The Bureaus ask commenters for feedback on the centroid method in light of their experience in Phase I. Should the Commission consider alternatives, such as the proportional method? For instance, should it consider unserved any census block if the data indicates more than 50 percent of the area is unserved?

B. Prioritizing Areas Eligible for Support

9. In the *USF/ICC Transformation Order and FNPRM,* the Commission sought comment on whether to target Phase II support to particular areas, such as those that lack *any* mobile service or ones that lack current generation (3G) service. Some commenters suggest prioritizing support to rural carriers or carriers with 2G or less capacity; another opposed prioritization of funding to areas with no service at all. Others suggested that the Commission should take into account additional factors, such as poverty level or whether an area is served by the National Highway System, instead of, or in addition to, coverage level. Despite this discussion in the record, the Commission received little input on implementation and specific measures for prioritizing eligible areas.

10. The Bureaus seek additional comment on whether and how the Commission might implement priorities for support among eligible areas. The Bureaus ask commenters to address whether the Commission should prioritize ongoing support to areas that lack coverage, a designated level of coverage, or whether there are other measurable factors that should be taken into account. The Bureaus observe that, in the *USF/ICC Transformation Order and FNPRM,* the Commission suggested that targeted areas could be prioritized by making a bidding credit available. The Bureaus seek additional specific comment on how the Commission might set an appropriate level(s) of bidding credit(s) to prioritize areas based on the existing level of coverage in a particular area. The Bureaus seek comment on whether and how the Commission might assure that support goes to areas that would lose service absent the receipt of ongoing support. In this regard, commenters are invited to discuss how, if at all, the availability of Remote Areas Fund support for the highest cost areas should affect the areas targeted for Mobility Fund Phase II.

C. Establishing Bidding and Coverage Units

11. In the *USF/ICC Transformation Order and FNPRM,* under its auction proposal, the Commission proposed to establish bidding units in each eligible census block for purposes of comparing bids and assessing performance, and to base the number of bidding units on the number of road miles in each eligible area. Road miles directly reflect the Mobility Fund's goals of supporting mobile services, and indirectly reflect many other important factors, such as business locations, recreation areas and work sites, since roads are used to access those areas. Several commenters recommend that the Commission consider other alternatives, including population, terrain, workplaces, annual revenues, and straight-line miles or traditional river miles, instead of, or in combination with, road miles. Some commenters also suggest that the Commission revisit the issue of bidding and coverage units after the Phase I auction before deciding on whether to use road miles as the sole bidding unit.

12. Given the results of the Mobility Fund Phase I auction, the Bureaus seek further comment on the use of road

miles to determine bidding units and corresponding coverage requirements. The Bureaus note that the Commission concluded that, for Phase I of the Tribal Mobility Funds, it would base bidding units on population rather than road miles. The Bureaus also invite additional comment on how specifically the Commission might measure or factor various suggested alternatives, such as terrain or topography, into its determination of bidding units and ask for input on the benefits or drawbacks of any particular approach.

D. Public Interest Obligations

13. In the *USF/ICC Transformation Order and FNPRM,* the Commission proposed that recipients of Mobility Fund Phase II support would be required to provide mobile voice and data services that meet or exceed a minimum bandwidth or data rate of 768 kbps downstream and 200 kbps upstream, consistent with the capabilities offered by representative 4G technologies. The Commission proposed that these data rates should be achievable in both fixed and mobile conditions throughout the cell area, including at the cell edge, at a high probability, and with substantial sector loading. The Commission further noted that the proposed measurement conditions may enable users to receive much better service when accessing the network from a fixed location or close to a base station. The Commission sought comment on whether, and in what ways, these metrics should be modified during the proposed 10-year term of support to reflect anticipated advances in technology. The Commission also proposed that the performance characteristics expected of Mobility Fund Phase II recipients be required to evolve over time, to keep pace with mobile broadband service in urban areas. Commenters generally recommend periodic review and modification of these requirements through a rulemaking proceeding. The Bureaus now seek to further develop the record on how often, and through what process, the Commission should modify the performance metrics applicable to Phase II support recipients. Commenters should address the threshold question of whether an evolving standard is appropriate given the proposed term of support and anticipated advances in technology. For example, should the Commission require that broadband networks built with support be capable of meeting increasing consumer demand for capacity and over a specified time period? If so, should the Commission mandate any specific network attributes?

E. Term of Support

14. In the *USF/ICC Transformation Order and FNPRM,* the Commission proposed a fixed term of support of 10 years and sought comment on a shorter term. In seeking comment on an optimal term for ongoing support, the Commission noted that it sought to balance the need to provide certainty to carriers to attract private investment and deploy services, while taking into account changing circumstances. Commenters generally agreed that a 10-year term was appropriate, noting that the term reflects the economic realities of network building, and need for financial assurance to upgrade or extend networks. The Bureaus seek additional comment on establishing an appropriate term of support, in light of the timeframes for deployment and private investment and the pace of new technology and marketplace developments. Further, the Bureaus request comment on the tradeoffs between using a 10-year term versus one or more shorter terms and which approach would provide the best structure for dealing with dynamic changes in the industry.

IV. Provider Eligibility

15. In the *USF/ICC Transformation Order and FNPRM,* the Commission proposed to require that parties seeking Mobility Fund Phase II support satisfy the same eligibility requirements that were adopted with respect to Phase I. Commenters generally support the Commission's proposal, though some advocate size-based and other restrictions. The Bureaus seek further comment on certain of these issues.

16. *Interplay with other universal service mechanisms.* The Bureaus seek comment on the inter-relationship between eligibility for Mobility Fund Phase II support and other universal service support mechanisms. The Commission noted that a party may be eligible to participate in both Connect America Phase II and Mobility Fund Phase II, but noted that carriers would not be allowed to receive redundant support for the same service in the same areas. The Bureaus seek additional comment on how to implement this principle so as to provide advance information to potential participants in a Mobility Fund Phase II auction. In particular, the Bureaus ask commenters to provide input on how the deployment of mobile service under Mobility Fund Phase II could be supplemented or modified for purposes of meeting the public interest obligations of Connect America Phase II. The Bureaus also seek comment on any interrelationship between eligibility for Mobility Fund Phase II support and the Remote Areas Fund that is to provide support in the highest cost areas.

17. *Small business participation.* In the *USF/ICC Transformation Order and FNPRM,* the Commission sought comment on whether small businesses should be eligible for a bidding preference in a Mobility Fund Phase II auction. The Commission noted that in a spectrum auction context, the Commission typically awards small business bidding credits ranging from 15 to 35 percent, depending on varying small business size standards. Commenters were asked to address the effectiveness of a preference to help smaller carriers compete at auction and whether the Commission should adopt a preference even if the bidding credit would result in less coverage than would occur without the bidding credit. The Commission also sought comment on how to define small businesses and what size bidding credit may be appropriate. Specifically, the Commission sought comment on whether a small business should be defined as an entity with average gross revenues not exceeding $40 million for the preceding three years, or whether it should use a larger size definition, such as average gross revenues not exceeding $125 million for the preceding three years. Several commenters supported the use of bidding credits to increase the competitiveness of small and rural carriers. The Bureaus now seek to develop the record in light of commenters' experience in Phase I, where bidding preferences were not available, except for Tribally-owned or controlled providers. Would the entities that were successful bidders in Auction 901 qualify as small businesses under the definitions the Commission asked about? To what extent do commenters continue to believe that a bidding credit is important to smaller carriers' ability to effectively compete at auction for support and how does that weigh against other Commission objectives?

V. Accountability and Oversight

18. In the *USF/ICC Transformation Order and FNPRM,* the Commission proposed to generally apply to Mobility Fund Phase II the same rules for accountability and oversight that will apply to all recipients of Connect America Fund (CAF) support. Among other things, the CAF accountability and oversight proposals are intended to create a process for the reasonable and prudent disbursement of universal service support. In Mobility Fund Phase I, the Commission authorized disbursement of funds in three equal

installments, linked to completion of certain milestones. The Bureaus seek comment on how to structure ongoing support payments over the term of support in a way that achieves the Commission's goals of providing sufficient and predictable support throughout the term of the Mobility Fund Phase II, while ensuring compliance with the Anti-Deficiency Act. Should support be tied to completion of certain milestones, disbursed on a regular recurring basis, or some combination of both?

VI. Tribal Priority Units

19. In the *USF/ICC Transformation Order and FNPRM,* the Commission proposed and sought comment on a number of provisions targeted at the specific connectivity challenges on Tribal lands. Among other things, the Commission sought comment on a possible mechanism that would allocate a specified number of ''priority units'' to Tribal governments to afford Tribes an opportunity to identify their own priorities. As discussed in the *USF/ICC Transformation Order and FNPRM,* priority units for each Tribe could be based upon a percentage, in the range of 20 to 30 percent, of the total population in unserved blocks located within Tribal boundaries. Tribal governments would have the flexibility to allocate these units in whatever manner they choose. Tribal governments could elect to allocate all of their priority units to one geographic area that is particularly important to them, or to divide the total number of priority units among multiple geographic units according to their relative priority. The Commission requested comment on whether this approach should apply to both the general and Tribal Mobility Fund Phase II, and how such priority units should be awarded in Alaska and Hawaii given the unique conditions in those states. The Commission also sought comment on how this mechanism, if adopted, would interact with the proposed 25 percent Tribal bidding credit.

20. Few parties offered comments addressing the priority units mechanism for Tribal governments, and those that did generally focused on issues unique to Alaska. In light of the relatively light record the Commission received on this issue and the results of Mobility Fund Phase I, the Bureaus seek additional comment on the Tribal priority units proposal. In particular, the Bureaus seek further comment on whether this approach should apply to Tribal governments participating in both the general and Tribal Mobility Fund Phase II, and, if so, how such priority units should be awarded in Alaska and Hawaii. Would the 25 percent Tribal bidding credit and the Tribal engagement obligation proposed in the *USF/ICC Transformation Order and FNPRM* be sufficient to ensure that Tribal priorities are met with respect to ongoing support under Phase II?

VII. Regulatory Flexibility Analysis

21. The *USF/ICC Transformation Order and FNPRM* included an Initial Regulatory Flexibility Analysis (IRFA) pursuant to 5 U.S.C. 603, exploring the potential impact on small entities of the Commission's proposal. The Bureaus invite parties to file comments on the IRFA in light of this additional notice.

VIII. Procedural Matters

22. This matter shall be treated as a permit-but-disclose proceeding in accordance with the *ex parte* rules. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented generally is required. Other requirements pertaining to oral and written presentations are set forth in 47 CFR 1.1206(b).

Federal Communications Commission.

Gary D. Michaels,

Deputy Chief, Auctions and Spectrum Access Division, WTB.

[FR Doc. 2012–29879 Filed 12–10–12; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Parts 234, 235, and 236

[Docket No. FRA–2011–0061, Notice No. 1]

RIN 2130–AC32

Positive Train Control Systems (RRR)

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking.

SUMMARY: FRA proposes amendments to regulations implementing a requirement of the Rail Safety Improvement Act of 2008 that certain passenger and freight railroads install positive train control (PTC) systems. The proposal would revise the regulatory provisions related to the *de minimis* exception to the installation of PTC systems generally, and more specifically, its application to yard-related movements. The proposal would also revise the existing regulations related to en route failures of a PTC system and discontinuances of signal systems once a PTC system is installed and make additional technical amendments to regulations governing grade crossing warning systems and signal systems, including PTC systems.

DATES: *Comments:* Written comments must be received by February 11, 2013. Comments received after that date will be considered to the extent possible without incurring additional expenses or delays.

Hearing: FRA anticipates being able to resolve this rulemaking without a public hearing. However, if prior to January 10, 2013, FRA receives a specific request for a public hearing, a hearing will be scheduled and FRA will publish a supplemental notice in the **Federal Register** to inform interested parties of the date, time, and location of such hearing.

ADDRESSES: Comments: Comments related to Docket No. FRA–2011–0061, may be submitted by any of the following methods:

- *Web Site:* Comments should be filed at the Federal eRulemaking Portal, *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* Room W12–140 on the Ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. Note that all comments received will be posted without change to *http://www.regulations.gov* including any personal information. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted comments or materials.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* at any time or to Room W12–140 on the Ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: Thomas McFarlin, Office of Safety

Assurance and Compliance, Staff Director, Signal & Train Control Division, Federal Railroad Administration, Mail Stop 25, West Building 3rd Floor West, Room W35–332, 1200 New Jersey Avenue SE., Washington, DC 20590 (telephone: 202–493–6203); Jason Schlosberg, Trial Attorney, Office of Chief Counsel, RCC–10, Mail Stop 10, West Building 3rd Floor, Room W31–207, 1200 New Jersey Avenue SE., Washington, DC 20590 (telephone: 202–493–6032); or Matthew T. Prince, Trial Attorney, Office of Chief Counsel, RCC–10, Mail Stop 10, West Building 7th Floor, Room W75–208, 1200 New Jersey Avenue SE., Washington, DC 20590 (telephone: 202–493–6146).

SUPPLEMENTARY INFORMATION: FRA is issuing this proposed rule to provide additional regulatory guidance and flexibility for the implementation of Positive Train Control (PTC) systems by railroads as mandated by the Railroad Safety Improvement Act of 2008 § 104, Public Law 110–432, 122 Stat. 4854, (Oct. 16, 2008) (codified at 49 U.S.C. 20157) (hereinafter ''RSIA'').

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I. Executive Summary

For years, FRA has supported the nationwide proliferation and implementation of positive train control (PTC) systems, forecasting substantial benefits of advanced train control technology in supporting a variety of business and safety purposes. As such, in 2005, FRA promulgated regulations providing for the voluntary implementation of processor-based train control systems. See 70 FR 11,052 (Mar. 7, 2005) (codified at 49 CFR part 236, subpart H). However, implementation was not mandated by FRA due to the fact that the costs for the systems far outweighed the possible benefits at that time.

Partially as a consequence of certain very severe railroad accidents, coupled with a series of other less serious accidents, Congress passed the Rail Safety Improvement Act of 2008 § 104, Public Law 110–432, 122 Stat. 4854 (Oct. 16, 2008) (codified at 9 U.S.C. 20157) (hereinafter ''RSIA'') mandating the implementation of PTC systems by December 31, 2015, on lines meeting certain thresholds. RSIA requires PTC system implementation on all Class I railroad lines that carry poison- or toxic-by-inhalation hazardous (PIH or TIH) materials and 5 million gross tons or more of annual traffic, and on any railroad's main line tracks over which intercity or commuter rail passenger train service is regularly provided. In addition, RSIA provided FRA with the authority to require PTC system implementation on any other line.

In accordance with the statutory mandate, FRA issued a final rule on January 15, 2010, and clarifying amendments on September 27, 2010. The final rule included various exceptions from mandatory PTC system implementation. For instance, the *de minimis* exception was developed to provide railroads an opportunity to avoid PTC system implementation where the burdens of the regulation would yield a gain of trivial or no value. In accordance with its statutory authority, the final rule also included a limited operations exception for passenger operations or segments over which limited or no freight railroad operations occur.

In a petition for rulemaking dated April 22, 2011 (''Petition''), the Association of American Railroads (AAR) requested that FRA initiate a rulemaking to propose expanding the *de minimis* exception and otherwise amending the rules concerning the limited operations exception, en route failures of trains operating within PTC systems, and the discontinuance of signal systems once PTC systems were installed. AAR also requested that FRA develop a new exception that would allow unequipped trains associated with certain yard operations to operate within PTC systems.

In response to the Petition, FRA proposes here to make several changes to part 236, subpart I. With respect to the specific *de minimis* exception at 49 CFR 236.1005(b)(4)(iii), FRA is proposing to modify the specific exception to raise the number of freight cars containing PIH materials from 100 cars to 200 cars and revise the grade limitation to be more consistent with the definition of ''heavy grade'' present in part 232. FRA is also proposing to remove the traffic limitation of 15 million gross tons from the general *de minimis* exception in paragraph (b)(4)(iii)(C), but not the categorical exception in paragraph (b)(4)(iii)(B). In response to AAR's suggestions for a yard move exception, FRA proposes to add a yard movement *de minimis* exception that would authorize movements by unequipped locomotives over PTC-equipped main line track segments for the purpose of switching service or transfer train movements. FRA does not propose to create an additional limited operations exemption, nor does FRA propose to remove oversight from signal system discontinuances or modify the default rules for resolving en route failures of a PTC system. However, FRA does propose to clarify that PTC equipment of non-controlling locomotives may be used to restore full PTC functionality to the consist. Finally, FRA proposes a number of technical amendments to the signal and grade crossing regulations of parts 234, 235, and 236.

For the first 20 years of the proposed rule, the estimated quantified benefits to society, due to the proposed regulatory changes, total approximately $156 million discounted at 7 percent and $211 million discounted at 3 percent. The largest components of the benefits come from reduced costs of PTC system wayside components because of proposed extensions of the *de minimis* risk exception under 49 CFR § 236.1005(b)(4)(iii)(B), and reduced costs of onboard PTC systems on locomotives operating in yard areas. A smaller benefit, independent of the other two benefits, comes from changes to the application process for a discontinuation or material modification of a signal system under 49 CFR part 235 where the application would have been filed as part of a PTC system installation. The following table presents the quantified benefits:

	Discount factor	
	7 percent	3 percent
Applications Benefit	$397,319	$446,926
Wayside Installation Benefit	100,587,630	136,123,559

	Discount factor	
	7 percent	3 percent
Onboard Installation Benefit	55,323,197	$74,867,958
Total Benefit	156,308,146	211,438,443

For the same 20-year period, the estimated quantified cost totals $360 thousand discounted at 7 percent and $531 thousand discounted at 3 percent. The costs associated with the proposed regulatory relief result from a slight increase in accident avoidance risk. FRA was able to estimate the monetized costs affected by changes in the general *de minimis* provisions, but was not able to estimate the costs of changes to the provision affecting locomotives in yard areas. The following table presents the total quantified costs of the proposed rule:

	Discount factor	
	7 percent	3 percent
Base Case	$360,055	$531,272
High Case	446,883	659,390
Low Case	273,227	403,155

FRA has also performed a sensitivity analysis for a high case (1,900 miles, 800 locomotives), base case (1,000 miles, 500 locomotives), and low case (100 miles, 200 locomotives).

The net benefit amounts for each case, subtracting the costs from the benefits, provide the following results:

	Discount factor	
	7 percent	3 percent
Base Case	$155,948,091	$210,907,171
High Case	279,584,048	378,211,032
Low Case	32,312,133	43,603,310

The analysis indicates that the savings of the proposed action far outweigh the cost.

II. Background

A. Regulatory History

Congress passed RSIA into law on October 16, 2008, mandating PTC system implementation by December 31, 2015. To effectuate this goal, RSIA required the railroads to submit for FRA approval a PTC Implementation Plan (PTCIP) within 18 months (*i.e.,* by April 16, 2010).

On July 27, 2009, FRA published a notice of proposed rulemaking (NPRM) regarding the mandatory implementation and operation of PTC systems in accordance with RSIA. During the comment period for that proceeding, CSX Transportation, Inc. (CSX) suggested that FRA create a *de minimis* exception to the requirement that lines carrying PIH materials traffic (but not applicable passenger traffic) be equipped with PTC systems.

The final rule, published on January 15, 2010, included a *de minimis* exception, since FRA believed that it contained significant merit and that it fell within the scope of the issues set forth in the proposed rule. However, since none of the parties had an opportunity to comment on this specific exception as provided in the final rule, FRA sought further comments on the extent of the *de minimis* exception. The further comments responsive to this issue were largely favorable, although AAR sought some further modification and clarification. In publishing its second PTC final rule on September 27, 2010, FRA decided to not further amend the *de minimis* exception based on the comments submitted.

In its Petition dated April 22, 2011, AAR requested that FRA initiate a rulemaking to propose expanding the *de minimis* exception and otherwise amending the rules concerning the limited operations exception, en route failures of trains operating with PTC systems, and the discontinuance of signal systems once PTC systems were installed. AAR also requested that FRA develop a new exception for allowing unequipped trains to operate on PTC lines during certain yard operations.

B. RSAC

On October 21, 2011, FRA held a meeting in Washington, DC with the PTC Working Group (PTC WG) to the Railroad Safety Advisory Committee (RSAC) to seek input and guidance concerning the issues raised in AAR's Petition and other technical amendments reflected herein. FRA facilitated and received valuable group discussion relating to each of the proposed amendments. The following analysis intends to present and address the principles raised through that process, and FRA's resultant proposed rule amendments. While not specifically addressed herein, FRA is also considering a reorganization of the rule so that exceptions to PTC system implementation are no longer interspersed throughout, but are rather commingled together in their own section or sections.

III. Section-by-Section Analysis

Unless otherwise noted, all section references below refer to sections in title 49 of the Code of Federal Regulations (CFR). FRA seeks comments on all proposals made in this NPRM.

Proposed Amendments to 49 CFR Part 234

Section 234.207 Adjustment, Repair, or Replacement of Component

Paragraph (b) of § 234.207 currently states: ''Until repair of an essential component is completed, a railroad shall take appropriate action under § 234.105, Activation failure, § 234.106,

Partial activation, or § 234.107, False activation, of this part.'' During training and enforcement actions, FRA has found the regulated entities to have misconceptions and misunderstandings regarding the response required under § 234.207. FRA believes that various regulated entities have misread paragraph (b) to indicate that the necessary response to any essential component of a highway-rail grade crossing warning system failing to perform its intended function is only applicable where the result of such failure is one of the three types of warning system malfunctions listed.

Accordingly, FRA is proposing language to clarify that defective conditions not resulting in a highway-rail grade crossing active warning system malfunction (i.e., an activation failure, partial activation, or false activation) need also be corrected without undue delay when the conditions and circumstances of the defective component negatively affects the system's proper functioning. The proposed language intends to make clear that the regulated entity must respond in accordance with this section to any ''essential component'' failing to perform its intended function. The PTC WG did not express any specific concerns with this proposal.

Section 234.213 Grounds

Section 234.213 currently indicates that each circuit that affects the proper functioning of a highway-rail grade crossing warning system shall be kept free of any ground or combination of grounds that will permit a current flow of 75 percent or more of the release value of any relay or electromagnetic device in the circuit.

With the migration of many warning systems, subsystems, and components from relay-based to microprocessor-based technologies, FRA believes that a more comprehensive indicator of prohibited current flow grounds is required. While the current threshold of 75 percent of the release value works well for relays and electromagnetic devices, it is apparent that the threshold needs to be refined to reflect the smaller current values associated with microprocessor-based technology. Therefore, FRA proposes to prohibit any ground or combination of grounds having a current flow of any amount which could adversely affect the proper safety-critical functioning of the warning system in order to better reflect the reality of microprocessor-based technology. There were no objections in the PTC WG to this proposal.

Proposed Amendments to 49 CFR Part 235

Section 235.7 Changes Not Requiring Filing of Application

FRA proposes amending § 235.7, which currently allows specified changes within existing signal or train control systems to be made without the necessity of filing an application with FRA's Associate Administrator for Safety. The amendment would provide each railroad a simplified process to obtain approval for modifications of existing signal systems in association with PTC system implementation.

Under § 235.7, a railroad may avoid filing an application for a broad variety of modifications to a signal system, so long as the resultant arrangement is in compliance with part 236. FRA recognizes that, during the process of installing the wayside PTC equipment, the railroads may have the resources and time available to implement needed or desired wayside signal system upgrades. Such modifications generally require FRA approval in accordance with § 235.5 and compliance with part 236. Given that the outcome of such modifications must be in compliance with part 236, FRA proposes to create an expedited approval process for modifications of the signal system by the installation, relocation, or removal of signals, interlocked switches, derails, movable-point frogs, or electronic locks in an existing system where the modification is directly associated with the implementation of PTC systems. Instead of filing an application for approval to FRA's Associate Administrator for Safety, a railroad would be permitted to instead submit its request to the FRA regional office that has jurisdiction over the affected territory, with a copy provided to representatives of signal employees, similar to the information provided under the provisions for pole line circuit elimination, § 235.7(c)(24)(vi). If the Regional Administrator for the appropriate regional office denies approval of the requested modification, the request would then be forwarded to the FRA Railroad Safety Board as an application for signal system modification. However, express approval from the Regional Administrator is necessary before the modifications may begin. The PTC WG expressed no concerns to this proposal.

Proposed Amendments to 49 CFR Part 236

Section 236.0 Applicability, Minimum Requirements, and Penalties

FRA proposes removing paragraph (i), Preemptive effect. FRA believes that this section is unnecessary because 49 U.S.C. 20106 sufficiently addresses the preemptive effect of FRA's regulations. Providing a separate Federal regulatory provision concerning the regulation's preemptive effect is duplicative and unnecessary.

Section 236.2 Grounds

Mirroring § 234.213, § 236.2 currently provides that each circuit that affects the safety of train operations shall be kept free of any ground, or combination of grounds, that will permit a current flow of 75 percent or more of the release value of any relay or electromagnetic device in the circuit. For the same reasons provided in the discussion of § 234.213 above, FRA proposes to revise § 236.2 to prohibit any ground or combination of grounds having a current flow of any amount which could adversely affect the proper functioning of any safety-critical microprocessor-based equipment relied on for the proper functioning of a signal or train control system in order to better reflect the reality of microprocessor-based technology. There were no objections in the PTC WG to this amendment.

Section 236.15 Timetable Instructions

Section 236.15 presently requires that automatic block, traffic control, train stop, train control, and cab signal territory be designated in the timetable instructions. FRA believes that, since PTC technology is a form of train control, its designation is already required under this section. However, in the interest of providing more clarity, FRA proposes modifying § 236.15 to explicitly require the designation of PTC territory equally to other types of signal and train control systems in a railroad's timetable instructions. This addition would ensure that the identified specific types of signal and train control systems in operation on a railroad would be designated in its timetable. There were no objections to this proposal from the PTC WG.

Section 236.567 Restrictions Imposed When Device Fails and/or Is Cut Out En Route

Section 236.567, which applies to territories where ''an automatic train stop, train control, or cab signal device fails and/or is cut out en route,'' presently requires trains to proceed in a specified restrictive manner until the next available point of communication where a report must be made to a designated officer, and an absolute block can be and is established in advance of the train on which the device is inoperative. Upon an absolute block being established, a train is

currently permitted to proceed at a speed not exceeding 79 miles per hour. The premise of this provision was the similarity between a manual block system and a train operating with an absolute block in advance of the train; § 236.0 previously allowed for train speeds up to 79 miles per hour within a manual block system. However, on January 17, 2012, manual block systems were no longer approved as a method of operation for freight trains operating at greater than 49 miles per hour or passenger trains operating at greater than 59 miles per hour under § 236.0(c)(2). See 75 FR 2598 at 2607. This change resulted in an inconsistency between § 236.0 and § 236.567, which was not contemporaneously revised. To rectify this inconsistency, FRA proposes to amend § 236.567 to properly reflect the amendment previously made to § 236.0 regarding allowable train speeds related to the use of an absolute block in advance of the train as a method of operation, by reducing the maximum allowable speed from 79 miles per hour to 59 miles per hour for passenger trains and 49 miles per hour for freight trains, as is the case for trains operating without a block signal system installed and operated in compliance with part 236. Where a block signal system is operational, the maximum allowable speed remains at 79 mph. The PTC WG had no objections to this change.

Because the harmonizing changes made the existing paragraph structure too complicated, FRA has reorganized the section with discrete paragraphs for each of the three operating phases: prior to the report to a designated officer, after the report but prior to the establishment of an absolute block in advance of the train, and after the establishment of the absolute block. This reorganization does not change the meaning of § 236.567, except as discussed above.

Section 236.1005 Requirements for Positive Train Control Systems

Section 236.1005 specifies PTC system functionality and implementation requirements, and provides for certain exclusions and the temporary rerouting of unequipped trains on PTC equipped lines. The allowable exclusions of § 236.1005(b)(4)(iii) address lines with *de minimis* PIH materials risk based upon specified criteria that can be expected to result in a risk of release of PIH materials being negligible on the subject track segment. The current categorical criteria under paragraph (b)(4)(iii)(B) are:

- A minimal amount of PIH materials cars transported (less than 100 cars per year, either loads or residue);
- A train speed limitation of either Class 1 or 2 track as described in part 213;
- An annual 15 million gross tonnage traffic limit;
- A ruling grade of less than 1 percent; and
- A spacing requirement where any train transporting a car containing PIH materials (including a residue car) shall be operated under conditions of temporal separation from other trains. A general *de minimis* exception under paragraph (b)(4)(iii)(C) may also be available for additional line segments carrying less than 15 million gross tons annually and where it is established to the satisfaction of the Associate Administrator that risk mitigations will be applied that will ensure that risk of a release of PIH materials is negligible.

In its Petition, AAR made certain proposals to modify these criteria, which are further discussed below. While FRA remains open to such modifications, any *de minimis* exception must apply in a way where Congress' intent is met. In other words, such exceptions must only cover situations where ''the burdens of regulation yield a gain of trivial or no value'' and should apply not ''to depart from the statute, but rather [as] a tool to be used in implementing the legislative design.'' *Environmental Defense Fund, Inc.* v. *EPA,* 82 F.3d 451, 466 (D.C. Cir. 1996) (inner quotations omitted); *Alabama Power Co.* v. *Costle,* 636 F.2d 323, 360–61 (D.C. Cir. 1979).

FRA continues to believe that *de minimis* exceptions may be available on low density main lines with minimal safety hazards that carry a truly minimal quantity of PIH materials. The preamble discussion to the final rule published January 15, 2010, focused primarily on the risks associated with PIH materials exposure. However, any *de minimis* exception must also consider the risks associated with the events that Congress intended PTC systems must be designed to prevent. In other words, when a *de minimis* exception applies, there must be *de minimis* risk that a train-to-train collision, overspeed derailment, incursion into a roadway worker zone, or movement over a switch in the wrong position may occur. See the definition of a PTC system in the RSIA, 49 U.S.C. 20157(i)(3).

After reviewing AAR's request internally and with the PTC WG, FRA hereby proposes to amend § 236.1005(b)(4)(iii) in accordance with the restrictions discussed below. FRA seeks comments on the following.

First, AAR proposes that the 100-car limit be only applicable to loaded, not residue, cars. While FRA is not opposed to some relaxation of this limit, the result must not introduce a situation where the risks associated with PIH materials exposure or the events PTC systems must be designed to prevent exceed a *de minimis* threshold. ''Residue'' is defined by the Pipeline and Hazardous Materials Safety Administration (PHMSA) to be ''the hazardous material remaining in a packaging, including a tank car, after its contents have been unloaded to the maximum extent practicable and before the packaging is either refilled or cleaned of hazardous material and purged to remove any hazardous vapors.'' As a result, the amount of hazardous material in a residue car can vary significantly, and is generally non-trivial. Accordingly, such cars are still considered to contain hazardous materials for the purposes of PHMSA regulations. *See generally* 49 CFR parts 172–174. Given the wide range of what may be considered ''residue'' (including tank cars containing many thousands of gallons of material), and the potential for equally serious consequence should a PTC-preventable accident (PPA) result in the release of a PIH material that may be contained in such a car, FRA is instead proposing to amend this criteria so that the total number of cars transporting PIH materials annually on a track segment be limited to 200, to include both loaded and residue, with no more than two trains transporting PIH materials per day. The current rule text does not provide a daily train limitation. However, with the potential increase in PIH materials cars moving over a line under this proposal, FRA finds more pressing reasons to maintain an acceptable level of daily and annual PIH materials traffic density. Discussions in the PTC WG indicated that residue cars are generally transported along the same lines as the loaded cars, such that doubling the allowable number of cars will have a similar impact as excluding residue cars from the number, but will prevent the unusual occurrences that might result from ignoring residue cars altogether. FRA seeks comment on this assumption, the proposed daily limitation on trains transporting PIH materials, and the proposal that the car limit be increased to 200 cars containing PIH, both loaded and residue.

The *de minimis* exception, under 49 CFR § 236.1005(b)(4)(iii)(B)(1), currently limits maximum authorized train speed to that afforded for Class 1 (10 mph) or Class 2 (25 mph) tracks in order to

reduce the kinetic energy available in any accident and to ensure that the forces impinging on any involved PIH materials tank car be sustainable. AAR proposes that the regulation provide a speed limitation only for those trains transporting any PIH materials. More specifically, AAR proposes a speed restriction of 40 miles per hour (*i.e.,* the same maximum authorized speed provided for certain rail-to-rail at-grade crossings under § 236.1005(a)(1)(i)), to be enforced by an ''operational technique,'' and only for trains carrying any PIH materials.

FRA is concerned that adherence to this 40 miles per hour restriction on such trains operating in higher-speed PTC territories will be dependent upon train handling by the train operator and that no onboard equipment would be utilized to provide the necessary warnings or enforcement. FRA has concerns regarding reliance on crew adherence to such a speed restriction, and other potential errors such as misunderstanding or miscommunication regarding the need for the restriction. Further, FRA is concerned that the risk of PIH materials release resulting from a collision or derailment at 40 miles per hour could be unacceptably higher than that at 25 miles per hour.

It should be noted that the current limitation on train speeds is not intended to totally eliminate the potential for collision or derailment, but rather is intended to significantly reduce the potential consequences by reducing the kinetic energy involved should such an event occur. Kinetic energy is the energy an object possesses when it is moving. During a normal stop that does not include a collision or derailment, most of the energy is absorbed in the brake system. But in a crash or derailment, that energy is suddenly, cataclysmically dissipated not by heating the brakes, but by the effects of crushing, tearing, and twisting of the vehicles involved. AAR offers a research study from the University of Illinois at Urbana-Campaign [1] showing that the probability of a hazardous material release from a rail car decreases as a track's class increases. However, FRA would like to point out that, as the maximum authorized speed on a track segment increases, the potential severity of any accident increases quadratically, such that an increase in speed from 25 miles per hour to 40 miles per hour would increase the kinetic energy in a crash by a factor of over 2.5. For example, a 2,000-pound object traveling 25 miles per hour has approximately 42,000 foot-pounds of energy; that same object traveling at 40 miles per hour has approximately 107,000 foot-pounds of energy. Ultimately, while the study suggests that an increase in track class may reduce the probability of an accident, any accident that occurs with increased speed would likely result in more severe consequences. Accordingly, FRA is not proposing to modify the speed limitation. However, FRA welcomes comments further analyzing the feasibility of considering the application of a maximum authorized speed, rather than a track class, for all trains as an element of applying this regulatory exception.

The existing requirement in § 236.1005(a)(1)(i) for rail-to-rail at-grade crossings involving a PTC route intersecting with a non-PTC route imposes a maximum authorized speed of 40 miles per hour through the crossing. However, a maximum authorized speed exceeding 40 miles per hour is acceptable if the opposing non-PTC route maintains, among other things, a 20 miles per hour maximum authorized speed. For such instances, the categorical *de minimis* exception actually provides a higher maximum authorized speed.

Nevertheless, FRA does not view the provisions as directly comparable. If a side collision was to occur in the case of a rail-to-rail at-grade crossing, the force of the side-impacted train is not opposing the force of the impacted train, and as such the cars of the impacted train are not subject to the same degree of immediate deceleration as occurs in a head-to-head collision. As a result, the kinetic energy of both the impacting train and the side-impacted train has a longer time period to be absorbed, significantly reducing the potential severity of the collision. By contrast, in a head-on collision, the force of one train is met by an opposing force from the other train. As a result, both trains are subject to immediate deceleration with energy dissipating in large part through damage to both trains. Such collisions have a much greater potential severity than side collisions. Accordingly, FRA is not willing to accept AAR's comparison of the speed restrictions at rail-to-rail at-grade crossings to speed restrictions necessary to qualify for the categorical *de minimis* risk exception.

AAR proposes that lines eligible for the *de minimis* risk exception be restricted to grades that are not ''heavy grades'' as defined by FRA in part 232. According to § 232.407(a)(1), heavy grade means:

(i) For a train operating with 4,000 trailing tons or less, a section of track with an average grade of two percent or greater over a distance of two continuous miles; and

(ii) for a train operating with greater than 4,000 trailing tons, a section of track with an average grade of one percent or greater over a distance of three continuous miles.

The steeper the grade, the more susceptible an operation becomes to concerns relating to train handling, overspeed, and other factors that may contribute to a PPA. FRA believes that placing a limit on ruling grade helps to avoid any situation in which an engineer may lose control of a train as a result of a failure to invoke a timely and sufficiently strong brake application.

While FRA views the allowance for heavy grade as proposed by AAR as potentially acceptable, the criteria in § 232.407 depends on the trailing tonnage of trains, which makes it difficult to apply to track segments independent of specific train movements. Accordingly, FRA proposes using a definition of heavy grade applicable to all trains: an average grade of one percent or greater over a distance of three miles. The alternative criteria of heavy grade in § 232.407, a section of track with an average grade of two percent or greater over a distance of two continuous miles, applies only to trains operating with 4,000 trailing tons or less. While the train-specific nature of this criteria precludes its use as part of the categorical *de minimis* exception, a railroad may instead seek a *de minimis* exception for a track segment meeting this less-restrictive criteria under the general *de minimis* exception in paragraph (b)(4)(iii)(C).

As an additional risk mitigation, AAR recommends strengthening operating practices protecting against unauthorized incursions into roadway work zones on track segments that have received approval to avoid PTC system implementation under the *de minimis* risk provision. AAR proposes that—in the case of a train approaching working limits on a line subject to the *de minimis* exception—the train crew be required to call the roadway worker in charge at a minimum distance of two miles in advance of the working limits to advise of the train's approach. If the train crew does not have knowledge of the working limits prior to approaching within two miles of the working limits or if it is impracticable to provide notification two miles in advance, such as if the working limits are less than two

[1] Athaphon Kawprasert and Christopher P. L. Barkan, *Effect of Train Speed on Risk Analysis of Transporting Hazardous Materials by Rail,* 2159 Transportation Research Record 59 (Dec. 2010), *available at http://trb.metapress.com/content/7682666175324228.*

miles from the initial terminal, AAR proposes that the train crew would be required to call the roadway worker in charge as soon as practicable.

FRA appreciates AAR's proposal to add this criteria. However, FRA believes that it is not significantly different from existing railroad operating rules, upon which FRA already expects compliance. Any differences between the existing operating rules and AAR's proposal are minimal and may only cause confusion. FRA believes that AAR's proposal does not warrant adoption within the federal requirements and is therefore not proposing it in this NPRM.

AAR recommends that FRA modify the temporal separation provision contained in § 236.1005(b)(4)(iii)(B)(4). The *de minimis* provision in the rule requires that trains transporting PIH materials be ''operated under conditions of temporal separation from other trains.'' Temporal separation has long been defined as meaning that trains do not operate on any segment of shared track during the same period. FRA continues to believe that the use of exclusive authorities under mandatory directives is an insufficient alternative to positive train control operation. AAR recommends modification of the temporal separation provision to permit an alternative means of achieving the same or greater risk reduction. AAR suggests that such alternative means should include clarification that emptying the block ahead of and behind a PIH materials train constitutes temporal separation and that it does not mean that when such trains are operating, no other train can be operated on the line. This procedure does not constitute ''temporal separation'' as FRA has previously defined the term, such as in 49 CFR part 211, appendix A, stating FRA's policy concerning waivers related to shared use of trackage by light rail and conventional operations. To avoid conflicting definitions, FRA is not in favor of establishing a different meaning of ''temporal separation'' in the context of this regulation. However, FRA does seek comment from all interested parties on the underlying method of operation, using absolute blocks ahead of and behind a PIH materials train as a means of providing the necessary protection against PPAs, especially with respect to the potential for human error. FRA points out that § 236.1005(b)(4)(iii)(C) already provides railroads with the opportunity to submit such alternative means (for line segments of less than 15 million gross tons) for approval by the Associate Administrator. FRA believes that this provision sufficiently addresses AAR's concern and does not propose amendment of the rule in accordance with AAR's suggestion.

FRA further believes that beyond the categorical exception provided in paragraph (b)(4)(iii)(B), a railroad may alternatively seek a *de minimis* exception under existing paragraph (b)(4)(iii)(C) for track segments that annually carry less than 15 million gross tons. With this regulatory option, railroads may offer, and FRA may consider, mitigations tailored to particular circumstances to ensure a negligible risk. FRA would evaluate the submittal and, if satisfied that the proffered mitigations would be successful, approve the exception of the line segment. FRA notes that various elements of PTC technology may in some cases provide the means for accomplishing this goal; for instance, a railroad may choose to submit a plan using intermittent data radios and PTC-equipped locomotives in order to enforce track warrants and temporary speed restrictions.

AAR recommends that if the other criteria for *de minimis* exceptions are met, the amount of traffic on the line should not disqualify it from eligibility from the exemption. AAR points to existing § 236.1005(b)(4)(iii)(C), which provides that FRA will ''consider'' relief from the obligation to install PTC systems on line segments with annual traffic levels under 15 million gross tons where the risk of a release of PIH materials is ''negligible.'' AAR suggests eliminating the 15 million gross tons limit contained in this provision. Moreover, AAR contends that it is unclear what constitutes a ''negligible'' risk and what discretion FRA would exercise should there be a showing of negligible risk. AAR further requests that FRA set a quantitative threshold for negligible risk, and suggests ''one-in-a-million'' as the criterion. AAR references standard MIL–STD–882C as the basis for such criterion.

With respect to paragraph (b)(4)(iii)(B), FRA has endeavored to address AAR's concerns with a provision that is broad enough to permit considerations of actual circumstances, limit this exception to railroads that would not otherwise need to install PTC systems, and make explicit reference to the requirement for potential safety mitigations. FRA has chosen 15 million gross tons as a threshold where mitigations are in place or could be put in place to establish a high sense of confidence that operations will continue to be conducted safely. In the context of the default provisions under paragraph (b)(4)(iii)(B), FRA has concern that eliminating the traffic density criteria would result in an exception being outside the scope of the *de minimis* risk. The derailment data cited by AAR is only a portion of the data that needs to be considered. FRA also recognizes the potential for a higher density line not being eligible for this exemption even though it may have fewer than 200 PIH materials cars on the line in a year. Consequently, FRA is not proposing to amend this limitation but is open to the possibility of considering some risk evaluation factors in lieu of a prescriptive train density limitation. FRA seeks comment from all interested parties on the existing 15 million gross tons density threshold and the suggested alternative of risk evaluation factors; FRA would expect full development and discussion of the risk evaluation factors and their application by any party suggesting such an alternative.

FRA also recognizes that under paragraph (b)(4)(iii)(C), the train density limit could conceivably be replaced by equivalent safety mitigations. In the interest in providing flexibility, without reducing safety, FRA is proposing to eliminate the 15 million gross tons limitation currently contained in this paragraph. FRA distinguishes the application of this train density limit in this paragraph from that in paragraph (b)(4)(iii)(B) because in (b)(4)(iii)(C) FRA would be considering the totality of circumstances and the mitigations proffered by the railroad. If a railroad submits a request under proposed paragraph (b)(4)(iii)(C), where the train density limit is not a categorical requirement, FRA would likely require some other train density limit—presumably more liberal—coupled with additional safety mitigations to achieve an equivalent level of safety.

FRA is not agreeable to setting a quantitative threshold for negligible risk in paragraph (b)(4)(iii)(C) as suggested by AAR. FRA notes that standard MIL–STD–882C is recognized in Appendix C to 49 CFR part 236 as an available standard for evaluating the safety of train control systems; however, the difficulties with using this type of criterion as a decisional criterion, as opposed to a convention in hazard analysis, are manifold. First, the actual metric is always unclear. FRA will assume that AAR may refer to release of a reportable quantity of a PIH material. The apparent suggestion is probability per route mile. However, it is unclear what should be the level of chance and the measurable time period (e.g., calendar hours, operating hours, PTC system life-cycle, *etc.*). Given that PIH materials releases are already infrequent events, and the potential for catastrophe from a single release is significant, it is

also unclear how this criterion would relate to the judgments that Congress has already made with respect to PIH materials transportation. AAR does not provide any reasoning or evidence sufficient to prove that the criterion is satisfied. AAR should be aware that the industry and FRA have experienced significant difficulty in developing tools for comparative risk assessment related to train control, which is the easier task in contrast with use of absolute risk criteria. FRA will, of course, welcome well-presented, simple, and direct hazard analyses. FRA will be looking to achieve confidence that the chance of an unintended release of PIH material is negligible, given the chances for severe mishaps on the particular line segment in question.

In addition, AAR suggests that within paragraph (b)(4)(iii)(C), the obligation of the railroad to establish that the risk of a PIH materials release is negligible should be limited to releases caused by PPAs. Proposed paragraph (b)(4)(iii)(C) provides that FRA will consider a *de minimis* risk exemption from the PTC mandate for certain line segments where it is established that the risk of a PIH materials release is negligible. AAR argues that the request to install PTC systems on line segments being candidates for such an exception should not be driven by the possibility of accidents that PTC systems cannot prevent. AAR states that other criteria of the *de minimis* risk exception such as temporal separation and reduced speed, if satisfied, already reduce the probability of accidents that the four core PTC system functions aim to prevent: train-to-train collision, overspeed derailment, incursion into established work zone limits, and movement through a main line switch in an improper position (*i.e.,* the four statutory PPAs). In the original final rule, FRA repeatedly referenced the exception as relating to *de minimis* PIH materials risk exception. We believe that this may have been confusing and would like to take this opportunity to provide further clarification. FRA originally used this term since the exception would only apply to freight traffic on lines where PIH materials traverse. FRA did not intend to exclude the four statutory PPAs as risk elements requiring consideration in order to qualify for the exception. Accordingly, FRA proposes to change the regulatory language to comport with this perspective by modifying the heading of paragraph (b)(4)(iii) to eliminate the potential for confusion.

The proposed rule modifies paragraph (b)(4)(iii)(A) to increase the car limit to 200 cars annually, as discussed above. As noted above, FRA proposes revising the heading of paragraph (b)(4)(iii) to read ''freight lines with *de minimis* risk.'' FRA also proposes to revise (b)(4)(iii)(B)(3) to specify the distance over which the ruling grade is measured, mirroring the definition of ''heavy grade'' in § 232.407 for trains operating with greater than 4,000 trailing tons. FRA proposes to amend paragraph (b)(4)(iii)(C) is amended by striking the limitation that only track segments with traffic less than 15 million gross tons is eligible for relief as posing only *de minimis* risk. A typographical error is also corrected in the table in paragraph (a). FRA seeks comment from all interested parties on these proposals.

Section 236.1006 Equipping Locomotives Operating in PTC Territory

AAR recommends that yard switching service and transfer train movements without operational onboard PTC equipment should be allowed to operate over PTC-equipped track segments. AAR argues that this exception is necessary in light of the constantly-changing consists that characterize yard operations that would render a PTC system ineffective. AAR's suggested exceptions for switching service and transfer train movements are discussed in turn.

In this context, FRA uses the term ''switching service'' to refer to switching service under 49 CFR § 232.5:

> the classification of freight cars according to commodity or destination; assembling of cars for train movements; changing the position of cars for purposes of loading, unloading, or weighing; placing of locomotives and cars for repair or storage; or moving of rail equipment in connection with work service that does not constitute a train movement.

This distinction is drawn from longstanding judicial interpretations of what constitutes a ''train movement.'' *See, e.g., United States* v. *Seaboard Air Line R. R. Co.,* 361 U.S. 78 (1959); *Louisville Jeffersonville Bridge Co.* v. *United States,* 249 U.S. 543 (1919); *see also* 66 FR 4104, 4148 (Jan 17, 2001) (defining ''switching service''). FRA has previously recognized that the nature of switching service precludes the application of some safety technologies or operational practices that are applicable to train movements. *See, e.g.,* 49 CFR part 232, subpart C (not requiring air brake tests as part of switching service, but requiring such tests for train movements of short distances). FRA has also previously recognized that Congress did not intend to sweep in yard tracks in the mandate for PTC system implementation. In the first PTC rulemaking, FRA defined main line to exclude ''where all trains are limited to restricted speed within a yard or terminal area or an auxiliary or industry tracks.'' 49 CFR 236.1003. In the final rule, FRA stated that ''any track within a yard used exclusively by freight operations moving at restricted speed is excepted from the definition of main line.'' 75 FR 2598, 2657 (Jan 15, 2010). Such tracks are generally considered to be other-than-main line track, and Congress's limitation of the PTC mandate to ''main line'' suggests that these tracks were not intended to be included. *See also* S. Rep. 110–270 (taking notice of the limited value PTC offers in preventing accidents in yards or terminals). The result of this exclusion is that many switching operations are excluded from the scope of the PTC mandate, where these operations do not extend on to the main line track that connects to the yard.

However, as AAR explains in its Petition, switching operations frequently require some movement along main track adjacent to or within a yard, for purposes of reaching other yard tracks or obtaining necessary distance, or ''headroom'', from yard tracks to make switching movements. Despite the exclusion of these other-than-main line tracks, switching service could therefore require PTC-equipped locomotives in order to make these movements on main line track. Given the statutory language suggesting that switching service was not subject to the PTC mandate and the potential to apply operation restrictions to reduce risk to an acceptable level, FRA agrees that it would be appropriate to provide an exception for locomotives performing switching service from the requirements to be equipped with a PTC system if appropriate safeguards are implemented.

AAR's Petition recommends that adequate safety can be provided by a concept AAR refers to as ''absolute protection.'' Such protection would be established by a dispatcher, who would withhold movement authority by signal or directive. PTC-equipped trains would be prevented from entering the zone by an enforced positive stop outside of the zone where operations with non-operational PTC-equipped trains were underway. FRA solicits comments on the practicality and safety potential of this approach. FRA also notes that such a system is very similar to the protection required for roadway workers by 49 CFR § 236.1005(a)(1)(iii), and also solicits comments on the application of similar measures to zones where switching operations are taking place on the main line track without operational PTC systems. These forms of protection of

PTC-equipped trains are proposed as defaults; as with other exceptions and exclusions, the rule proposes to allow each railroad to provide alternative measures in its PTCSP.

AAR's Petition also suggests that such an exemption should also apply to transfer train movements. As such, the distance the unequipped locomotives could travel from a yard or terminal would be up to 20 miles. As previously noted, FRA recognizes that Congress specifically used the term ''main line'' and seeks comments on whether that linguistic choice would indicate an intention not to include certain train movements—including short train movements in and around railroad yards—within the statutory mandate. Many transfer train movements share older locomotives with switching operations, making PTC system implementation more costly and any switching service exception that is provided would be inapplicable if associated transfer trains utilizing the same locomotive would require PTC system implementation. Moreover, transfer trains in yard areas generally operate for short distances at lower speeds, and many only operate within yard limits. FRA seeks comments from interested parties on its interpretation and application of the statutory mandate as it relates to short train movements in and around yard areas.

In accordance with this potentially acceptable perspective, FRA is proposing a *de minimis* exception applicable specifically to certain transfer train movements, at least for a period of time until the older locomotives used in yard service may be replaced. Such locomotives will presumably be gradually replaced with newer locomotives, which would then allow for the implementation of PTC systems on locomotives used in transfer train service. However, such locomotives could also be replaced by existing long haul locomotives not equipped with PTC systems or with non-functioning PTC systems. Thus, while FRA is not proposing a specific provision regarding the potential duration of such an exception, FRA seeks comments relating to how long the duration of this exception should apply. FRA also seeks comment on any mitigations that could be employed to bring the PPA risk down to a negligible level in these situations.

The existing PTC regulations already provide the parameters for a general *de minimis* exception. Thus, while any exception provided must still fall within the legal understanding of what is considered *de minimis,* FRA seeks suggestions on how to tailor such an exception specifically for certain transfer train movements in and around yard areas. FRA recognizes that not all transfer train movements will qualify for an exception.

FRA also recognizes that, in its Petition, AAR already suggests one such mitigation in the form of what it calls ''absolute protection.'' AAR states that absolute protection requires that the dispatcher withhold movement authority between two points of control by signal indication or mandatory directive. According to AAR, the dispatcher would also hold other trains clear by providing blocking protection within the traffic control system. Under AAR's proposal, the movement of non-PTC equipped locomotives would be limited to 30 miles per hour and the distance the locomotives could travel from a yard or terminal would be limited to 20 miles.

FRA seeks comments from interested parties on AAR's suggested mitigation, particularly as to whether it will reduce the PPA risk to a negligible level. FRA requests that such comments include an analysis of how this, or any other proposal, applies to each statutory PPA and to the general prevention of PIH materials release. FRA also seeks comments on what other safety mitigations, including temporal separation and those used in the event of an en route failure, would be adequate to ensure a proper level of safety for switching service and transfer train movements in and around yard areas that would operate without the benefit of a PTC system.

FRA also seeks comments regarding any concerns relating the application of any transfer train *de minimis* exception to track segments that share freight and passenger traffic and how such an exception would interrelate to any main line track exception already provided for passenger service under § 236.1019. FRA recognizes that, if a passenger train is required to have an operational PTC system, the operational restrictions and enforced positive stop outside of the yard zone may serve to protect against an incursion by an equipped passenger train into a yard area with potentially active train movements without operative onboard PTC systems. If the passenger train is unequipped as the result of a main line track exclusion, a necessary component of that exclusion is either temporal separation between the freight and passenger service, operations limited to restricted speed, an alternate risk mitigation plan which would provide an equivalent level of safety, or a requirement that the passenger trains not be carrying passengers within the limits of the exclusion. As a result, the only times where unequipped freight switching operations subject to the switching exclusion and a passenger train carrying passengers subject to a main line track exclusion may occupy the same zone will be when both are operating at restricted speed and therefore should be prepared to stop within half of their range of vision, or where the railroads have provided alternative risk mitigations that result in an equivalent level of safety.

AAR's Petition recommended FRA limit the speed of unequipped locomotives and trains to 30 miles per hour, or restricted speed if multiple unequipped movements take place within the same area at the same time. This speed restriction matches that of the en route failure provision in § 236.1029, which is referenced by the temporary rerouting provision at § 236.1005(j) and the Class II and III locomotive exception at § 236.1006(c). Because FRA views this yard move exception as a *de minimis* risk exception, FRA proposes to limit the speed of movements to 25 miles per hour, the relevant speed restriction for the general *de minimis* exception at § 236.1005(b)(4)(iii). FRA seeks comment on this proposal and AAR's alternative suggestion.

FRA proposes to add a new paragraph (b)(5) to this section to allow railroads to request a yard move *de minimis* risk exception for switching service or transfer train service in and around yard areas. The proposed exception would allow locomotives engaged in these types of activities to operate on PTC-equipped main line track without the requirement to install an onboard PTC apparatus. The proposed exception provides ample flexibility, with paragraph (b)(5)(i) allowing railroads to tailor their risk mitigations to particular yard operations to ensure that the risk of a PPA or the release of PIH materials is negligible. Paragraph (b)(5)(ii) defines the distance a transfer train may operate under this exception as 10 miles from its entry onto PTC-equipped main line track, allowing for 20-mile round-trip train movements. FRA seeks comments on this proposal. FRA specifically seeks comments on the feasibility of using the train's point of entry onto a main line as a means to begin measuring the mileage limit under this exception. FRA also seeks comments on whether the train's point of origin, where the train is assembled and receives its required inspections, should be the location where such measurements should begin. FRA recognizes that some transfer trains may travel 20 miles to an outlying point from a yard. However, allowing such

movements in both directions from a transfer train's point of entry onto a PTC-equipped track segment would effectively create a 40-mile zone outside of yards within which the PTC system would not be fully effective due to the presence of unequipped trains. Limiting the distance of transfer train movements to an area 10 miles from the initiation of service will limit the size of this zone to 20 miles, is consistent with the existing 20 mile movement restriction related to transfer trains, and would permit round trip movements of up to 20 miles. FRA seeks comment on this limitation and potential alternative distance limitations. Paragraph (b)(5)(iii) limits the speed of locomotives and trains operating under this exception to a maximum of 25 miles per hour.

FRA also proposes to move the PTCIP reporting requirement from paragraph (b)(2) of this section to a new paragraph (a)(5) in § 236.1009.

Section 236.1009 Procedural Requirements

FRA proposes to move the PTCIP reporting requirement from paragraph (b)(2) of § 236.1006 to a new paragraph (a)(5) of this section. The purpose of this proposal is not merely for organizational purposes. FRA also intends to require the submission of additional information so that it may better fulfill its congressional reporting obligations and to otherwise fully and accurately monitor the progress of PTC system implementation. The current language of § 236.1006(b)(2) requires railroads to report the status of achieving its goals with respect to equipping locomotives with fully-operative onboard PTC apparatuses on PTC-equipped track segments. However, for FRA to fulfill its statutory obligations and regulatory objectives, it would also require additional implementation information. Accordingly, under the proposed rule, FRA expects submission of implementation data relating to wayside interface units, communication technologies, back-end computer systems, transponders, and any other PTC system components.

The PTC WG expressed no concerns with this proposal.

Section 236.1019 Main Line Track Exceptions

In its Petition, AAR suggests that FRA should exempt certain limited freight operations in a similar manner as provided for limited passenger operations under § 236.1019(c). AAR suggests exempting track segments over which not more than two trains containing PIH materials carloads are transported daily, where the annual freight traffic over the line is less than 15 million gross tons.

RSIA provided FRA with the authority to redefine main line for intercity or commuter rail passenger transportation routes or segments where there is limited or no freight operations. See 49 U.S.C. 20157(i)(2)(B). Under this authority, FRA, in § 236.1019(c), provided an exception from PTC system implementation on line segments where there is limited or no freight operations and where either all trains are limited to restricted speed, temporal separation is provided between passenger trains and other trains, or passenger service is operated under a risk mitigation plan. The purpose of 49 CFR 236.1019(c) is to eliminate the requirement for PTC system installation in the case of low-risk passenger operations. For these reasons, FRA does not believe it is prudent at this time to extend a ''limited or no freight'' exception to track segments where there is more than ''limited or no freight.''

Nevertheless, FRA recognizes that the exception sought by AAR already exists, albeit in a different form. The general *de minimis* risk exception of § 236.1005(b)(4)(iii)(C) allows railroads to apply for an exception from the requirement to implement PTC systems on track segments where the railroad can demonstrate that there is negligible risk of PTC-preventable accidents or a release of PIH materials. Because the statutory authority for the existing limited operations exception applies only to intercity or commuter rail passenger transportation, creating a new limited operations exception for freight track segments would depend upon FRA's authority to create a *de minimis* exception to the regulation. Creating such an exception but referring to it as a ''limited operations exclusion'' would only serve to create confusion.

Section 236.1021 Discontinuances, Material Modifications, and Amendments

Under ordinary circumstances, a railroad seeking to discontinue a signal system must file an application pursuant to 49 CFR part 235. However, to simplify the process of making changes to a signal system related to PTC systems implementation, § 236.1021 currently allows railroads to request approval of a discontinuance or material modification of a signal system in an RFA to its PTCIP, PTC development plan (PTCDP) or PTC safety plan (PTCSP), as appropriate. In its Petition, AAR recommends that FRA allow automatic approval (i.e., without the need to file an RFA) for the removal of cab signal systems from PTC-equipped lines or the removal of any signal system where stand-alone PTC systems are used. However, the Petition did not provide adequate justification to support the categorical approval of such changes without any FRA oversight. Even in its Petition, AAR argued that new PTC systems are likely to suffer en route failures. Such failures would be mitigated by the presence of an underlying signal system. Accordingly, FRA is not willing at this time to change the text of § 236.1021 in accordance with AAR's request. However, FRA does seek comment from interested parties on how to further simplify the procedures currently contained in this section.

Section 236.1029 PTC System Use and En Route Failures

Section 236.1029 currently provides a means of safely reacting to the en route failure of a PTC system. When the onboard apparatus of a controlling locomotive within a PTC system fails en route, § 236.1029 requires that the train proceed at restricted speed, or where a block signal system is in operation according to signal indication at medium speed, until an absolute block is established ahead of the train; after the absolute block is established, the train may proceed at speeds between 30 miles per hour and 79 miles per hour, depending on the nature of the signal system in place, if any, and the nature of the train. AAR, in its petition, assents to this procedure for each location where a PTC systems is the exclusive means of delivering mandatory directives, but suggests substantial revisions to this procedure where a PTC system is not the exclusive means of delivering mandatory directives (*e.g.,* where mandatory directives are also delivered by radio). The AAR proposal would allow trains to continue to a designated repair or exchange location indentified in a railroad's PTCSP. While travelling to one of these locations, the AAR proposal would allow freight trains to continue at track speed in signaled territory, up to 40 miles per hour for freight trains in non-signaled territory, and up to 30 miles per hour for trains carrying PIH materials. The proposal also recommends a 30-miles-per-hour limitation for passenger trains; Amtrak suggests that the appropriate limitation for passenger trains is 40 miles per hour.

FRA is sensitive to the concerns expressed regarding PTC system reliability and the railroads' desire to avoid restrictions where a PTC system fails. However, the mandate to implement PTC systems reflects a congressional determination that present methods for train operation are

inadequate. Accordingly, FRA must ensure that procedures for train operation during the failure of a PTC system provide the additional degree of safety required by Congress. FRA is therefore rejecting AAR's petition to amend the rule language on this issue. In the original final rule, FRA provided flexibility for railroads in establishing alternative procedures for operations following an en route failure. While FRA does not view allowing trains to continue at track speed after a PTC system is rendered inoperable as a generally acceptable procedure, there may be circumstances under which such operations are appropriate. If such circumstances exist, the railroads may provide in its PTCSP, which would then be subject to FRA review and approval, an alternative en route failure procedure pursuant to paragraph (c) of this section. While FRA is not willing to grant AAR's request at this time, FRA seeks comment on this issue and suggestions for other reasonable default provisions.

AAR also requests clarification concerning the failure of an onboard PTC apparatus of the train's controlling locomotive, where a second PTC-equipped locomotive exists capable of providing PTC system functionality. FRA proposes to amend § 236.1029 to specifically indicate that, when a trailing locomotive is used to maintain full PTC system functionality, the system is considered operable and therefore is not considered to have failed en route. Paragraph (g) provides that if full functionality of the onboard PTC apparatus in the controlling locomotive is restored by use of a secondary apparatus, such as the onboard equipment of a trailing locomotive, the train can continue operations as provided for in the railroad's PTCSP. Paragraph (g) also requires railroads to provide procedures for how this change-over of the PTC system onboard functions will take place.

IV. Regulatory Impact and Notices

A. Executive Orders 12866 and 13563 and DOT Regulatory Policies and Procedures

This NPRM has been evaluated in accordance with existing policies and procedures, and determined to be significant under Executive Order 12866, Executive Order 13563 and DOT policies and procedures. 44 FR 11,034 (Feb. 26, 1979). We have prepared and placed in the docket a regulatory impact analysis (RIA) addressing the economic impact of this NPRM.

The Federal Railroad Administration (FRA) proposes amendments to regulations implementing a requirement of the Rail Safety Improvement Act of 2008 (RSIA) that certain passenger and freight railroads implement PTC systems. The proposal includes revising the regulatory language defining the *de minimis* exception, as it applies generally and more specifically to yard-related movements. The proposal also includes revising the rules regarding en route failures and discontinuances of signal systems.

The proposed provisions regarding applications to modify signal and train control systems would streamline and simplify the application process for a discontinuation or material modification of a signal system under 49 CFR part 235 where the application would have been filed as part of a PTC system implementation.

The proposed revisions to the existing *de minimis* risk exception under 49 CFR § 236.1005(b)(4)(iii) will allow railroads to avoid installing PTC systems' wayside equipment on affected segments. FRA is unsure of the mileage of wayside that will be affected, in part because the railroads have indicated that they intend to reroute PIH materials traffic from many miles of their systems. FRA analyzed the impact of extending the *de minimis* risk exception to cover an additional 1,000 miles of wayside, as well as two sensitivity cases—one where the mileage affected was higher (1,900 miles) and one where the mileage affected was lower (100 miles). The estimated savings per mile was $50,000 per mile. All values in the analysis are measured in 2009 dollars.

FRA also analyzed the benefits of extending the *de minimis* risk exception as it would apply to equipping locomotives involved in yard operations with onboard PTC apparatuses. Again, FRA faced uncertainty in estimating the number of locomotives that will be affected. For the base case, FRA estimated that 500 locomotives will be affected. FRA also analyzed two cases for sensitivity—a high case where 800 locomotives will be affected and a low case where 200 locomotives will be affected. Applying the extended *de minimis* risk exception to yard operations will allow the railroads to avoid equipping locomotives with onboard PTC systems apparatuses, at a unit savings of $55,000 per locomotive.

For both wayside and onboard portions of the benefit, FRA included the maintenance costs saved by avoiding installation. FRA estimated the maintenance costs as 15 percent of the value of the installed base.

TABLE 1—TOTAL DISCOUNTED BENEFITS

	Discount Factor	
	7 percent	3 percent
Base case:		
Applications Avoided Benefit	$397,319	$446,926
Wayside Installation Benefit	100,587,630	136,123,559
Onboard Installation Benefit	55,323,197	74,867,958
Total Benefit	156,308,146	211,438,443
High case:		
Applications Avoided Benefit	397,319	446,926
Wayside Installation Benefit	191,116,498	258,634,763
Onboard Installation Benefit	88,517,115	119,788,732
Total Benefit	280,030,931	378,870,421
Low case:		
Applications Avoided Benefit	397,319	446,926
Wayside Installation Benefit	10,058,763	13,612,356
Onboard Installation Benefit	22,129,279	29,947,183
Total Benefit	32,585,361	44,006,465

In general, the costs of allowing railroads the ability to avoid PTC implementation costs will be foregone safety benefits coupled with some reporting costs. The proposal to extend the *de minimis* risk exception affects track segments that are likely to have a risk of PTC preventable accidents that is only slightly greater than similar segments equipped with PTC wayside units. FRA analyzed those incremental costs, the only costs analyzed below.

TABLE 2—DISCOUNTED 20-YEAR TOTAL COSTS

	Discount Factor	
	7 percent	3 percent
Base Case	$360,055	$531,272
High Case	446,883	659,390
Low Case	273,227	403,155

A second proposed *de minimis* risk exception, currently proposed to be codified under 49 CFR 236.1006(b)(5), affects whether locomotives used in switching operations need to be equipped with onboard PTC apparatuses in order to cross or travel along main track in yards. This newly created proposal requires the railroads to maintain a negligible risk of PTC preventable accidents. FRA does not specify how railroads are to achieve that negligible risk, so FRA cannot estimate whether the residual risk generated by the unequipped locomotives is greater or less than the risk if the railroad were required to install on board PTC systems equipment. In any event, negligible risk means the residual risk is of a very low order of magnitude. In this analysis, FRA has no way to monetize those costs and does not estimate those costs, but requests comments on those costs.

The costs of the changes to procedural requirements are very low, and only consist of forwarding to FRA data likely already compiled for railroad management purposes.

FRA calculated the net societal benefits as 20-year discounted totals.

TABLE 3—DISCOUNTED 20-YEAR TOTAL NET BENEFITS

	Discount Factor	
	7 percent	3 percent
Base Case	$155,948,091	$210,907,171
High Case	279,584,048	378,211,032
Low Case	32,312,133	43,603,310

In short, the rulemaking will create net benefits in all scenarios, with the only uncertainty being the magnitude of those benefits.

FRA requests comments on all aspects of the RIA.

B. Regulatory Flexibility Act and Executive Order 13272

To ensure that the potential impact of this rulemaking on small entities is properly considered, FRA developed this proposed rule in accordance with Executive Order 13272 (''Proper Consideration of Small Entities in Agency Rulemaking'') and DOT's policies and procedures to promote compliance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

The Regulatory Flexibility Act requires an agency to review regulations to assess their impact on small entities. An agency must conduct a regulatory flexibility analysis unless it determines and certifies that a rule is not expected to have a significant economic impact on a substantial number of small entities.

As discussed in the preamble above, FRA is proposing amendments to regulations implementing a requirement of the Rail Safety Improvement Act of 2008 that certain passenger and freight railroads install positive train control systems. The proposal includes revising the regulatory language defining the *de minimis* exception, as it applies generally and more specifically to yard-related movements. The proposal also includes revising the rules regarding en route failures and discontinuances of signal systems. FRA is certifying that this proposed rule will result in ''no significant economic impact on a substantial number of small entities.'' The following section explains the reasons for this certification.

1. Description of Regulated Entities and Impacts

The ''universe'' of the entities under consideration includes only those small entities that can reasonably be expected to be directly affected by the provisions of this rule. In this case, the ''universe'' would be Class III freight railroads that operate on rail lines that are currently required to have PTC systems installed. Such lines are owned by railroads not considered to be small.

The U.S. Small Business Administration (SBA) stipulates in its ''Size Standards'' that the largest a railroad business firm that is ''for-profit'' may be, and still be classified as a ''small entity,'' is 1,500 employees for ''Line Haul Operating Railroads'' and 500 employees for ''Switching and Terminal Establishments.'' ''Small entity'' is defined in the Act as a small business that is independently owned and operated, and is not dominant in its field of operation. Additionally, section 601(5) defines ''small entities'' as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000.

Federal agencies may adopt their own size standards for small entities in consultation with SBA and in conjunction with public comment. Pursuant to that authority, FRA has published a final policy that formally establishes ''small entities'' as railroads which meet the line haulage revenue requirements of a Class III railroad.[2] The revenue requirements are currently $20 million or less in annual operating revenue. The $20 million limit (which is adjusted by applying the railroad revenue deflator adjustment) [3] is based on the Surface Transportation Board's (STB) threshold for a Class III railroad carrier. FRA is using the STB's threshold in its definition of ''small entities'' for this rule.

FRA believes that portions of the proposal revising the rules regarding en route failures and discontinuances of signal systems are technical in nature, and have small economic impacts on any regulated entities, large or small.

The changes to the *de minimis* provisions in the proposed regulation would impact Class III railroads that operate on lines of other railroads currently required to have PTC systems installed. To the extent that such host railroads receive relief from such a requirement along certain lines as proposed in this NPRM, Class III railroads that operate over those lines would not have to equip their locomotives with PTC system components. FRA believes that small railroads operating over the affected lines are already allowed to avoid equipping locomotives under § 236.1006(b)(4), or are otherwise equipping their locomotives to operate over other track segments equipped with PTC systems. Further, some Class III railroads host passenger operations, but FRA does not believe any of those Class III railroads have any switching operations that would be affected by the proposed rule. To the extent that any Class III railroads are affected in circumstances of which FRA is unaware, the effect would be a benefit, in that the Class III railroads would be able to avoid installing PTC systems on some locomotives. FRA requests comment on whether any other small entities would be affected, and if such small entities would be affected what

[2] *See* 68 FR 24891 (May 9, 2003); 49 CFR part 209, app. C.

[3] For further information on the calculation of the specific dollar limit, please see 49 CFR part 1201.

the impacts on them would be, whether those impacts would be significant and whether the number of small railroads affected is substantial. FRA believes that no small entities would be affected by changes to the *de minimis* provisions, and that therefore the number of small entities affected is not substantial, and that the impact on them is not significant.

One small railroad is required to file a PTCIP and would be affected by the changes in the reporting requirements in § 236.1009. The reporting requirements will require the railroad to report its progress in installing PTC, in April 2013, 2014 and 2015, in order to comply with the statutory deadlines. FRA believes that all railroads implementing PTC will track this information and compile it as part of internal management activities at least as frequently for what is likely to be a relatively large capital project on every affected railroad. FRA believes the incremental reporting regulatory burden is negligible, on the order of forwarding to FRA an email already generated within a railroad. FRA believes this is not a significant burden upon the one railroad affected. Thus FRA believes the reporting requirements will not have a significant impact on a substantial number of small entities.

2. Certification

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 605(b), the FRA Administrator certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. FRA requests comment on both this analysis and this certification, and its estimates of the impacts on small railroads.

C. Paperwork Reduction Act

The information collection requirements in this proposed rule are being submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq*. The sections that contain the current information collection requirements and the estimated time to fulfill each proposed requirement are summarized as follows:

CFR Section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
234.275: Processor-Based Systems—Deviations from Product Safety Plan (PSP)				
Letters	20 Railroads	25 letters	4 hours	100
235.7: Requests to FRA Regional Administrators for Modification of a Signal System Related to PTC Implementation (New Requirement).	38 Railroads	500 requests	5 hours	2,500
PTC Related Modification Request Copies to Railroad Union(s) (New Requirement).	38 Railroads	500 request copies	30 minutes	250
236.15: Timetable Instructions—Designation of Positive Train Control (PTC) Territory in Instructions (Revised Requirement).	38 Railroads	13 timetable Instructions	1 hour	13
236.18: Software Mgmt Control Plan.	184 Railroads	184 plans	2,150 hours	395,600
Updates to Software Mgmt. Control Plan.	90 Railroads	20 updates	1.50 hours	30
236.905: Updates to RSPP	78 Railroads	6 plans	135 hours	810
Response to Request for Additional Info.	78 Railroads	1 updated doc	400 hours	400
Request for FRA Approval of RSPP Modification.	78 Railroads	1 request/modified RSPP	400 hours	400
236.907: Product Safety Plan (PSP)—Dev.	5 Railroads	5 plans	6,400 hours	32,000
236.909: Minimum Performance Standard.				
Petitions for Review and Approval.	5 Railroads	2 petitions/PSP	19,200 hours	38,400
Supporting Sensitivity Analysis.	5 Railroads	5 analyses	160 hours	800
236.913: Notification/Submission to FRA of Joint Product Safety Plan (PSP).	6 Railroads	1 joint plan	25,600	25,600
Petitions for Approval/Informational Filings.	6 Railroads	6 petitions	1,928 hours	11,568
Responses to FRA Request for Further Info. After Informational Filing.	6 Railroads	2 documents	800 hours	1,600
Responses to FRA Request for Further Info. After Agency Receipt of Notice of Product Development.	6 Railroads	6 documents	16 hours	96
Consultations	6 Railroads	6 consults	120 hours	720
Petitions for Final Approval	6 Railroads	6 petitions	16 hours	96

CFR Section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
Comments to FRA by Interested Parties.	Public/RRs	7 comments	240 hours	1,680
Third Party Assessments of PSP.	6 Railroads	1 assessment	104,000 hours	104,000
Amendments to PSP	6 Railroads	15 amendments	160 hours	2,400
Field Testing of Product—Info. Filings.	6 Railroads	6 documents	3,200 hours	19,200
236.917: Retention of Records			160,000 hrs	
Results of tests/inspections specified in PSP.	6 Railroads	3 documents/records	160,000 hrs.; 40,000 hrs	360,000
Report to FRA of Inconsistencies with frequency of safety-relevant hazards in PSP.	6 Railroads	1 report	104 hours	104
236.919: Operations & Maintenance Man.				
Updates to O & M Manual	6 Railroads	6 updated docs.	40 hours	240
Plans for Proper Maintenance, Repair, Inspection of Safety-Critical Products.	6 Railroads	6 plans	53,335 hours	320,010
Hardware/Software/Firmware Revisions.	6 Railroads	6 revisions	6,440 hours	38,640
236.921: Training Programs: Development.	6 Railroads	6 Tr. Programs	400 hours	2,400
Training of Signalmen & Dispatchers.	6 Railroads	300 signalmen; 20 dispatchers.	40 hours; 20 hours	12,400
236.923: Task Analysis/Basic Requirements: Necessary Documents.	6 Railroads	6 documents	720 hours	4,320
Records	6 Railroads	350 records	10 minutes	58
SUBPART I—NEW REQUIREMENTS.				
236.1001—RR Development of More Stringent Rules Re: PTC Performance Stds.	38 Railroads	3 rules	80 hours	240
236.1005: Requirements for PTC Systems.				
Request for Non-Temporal Alternative Risk Mitigation) (New Requirement).	38 Railroads	27 requests	64 hours	1,728
Temporary Rerouting: Emergency Requests.	38 Railroads	47 requests	8 hours	376
Written/Telephonic Notification to FRA Regional Administrator.	38 Railroads	47 notifications	2 hours	94
Temporary Rerouting Requests Due to Track Maintenance.	38 Railroads	720 requests	8 hours	5,760
Temporary Rerouting Requests That Exceed 30 Days.	38 Railroads	361 requests	8 hours	2,888
236.1006: Requirements for Equipping Locomotives Operating in PTC Territory.				
PTC Progress Reports	38 Railroads	35 reports	16 hours	560
236.1007: Additional Requirements for High Speed Service.				
Required HSR–125 Documents with approved PTCSP.	38 Railroads	3 documents	3,200 hours	9,600
Requests to Use Foreign Service Data.	38 Railroads	2 requests	8,000 hours	16,000
PTC Railroads Conducting Operations at More than 150 MPH with HSR–125 Documents.	38 Railroads	3 documents	3,200 hours	9,600
Requests for PTC Waiver	38 Railroads	1 request	1,000 hours	1,000
236.1009: Procedural Requirements.				
Host Railroads Filing PTCIP or Request for Amendment (RFAs).	38 Railroads	1 PTCIP; 20 RFAs	535 hours; 320 hours	6,935
Jointly Submitted PTCIPs	38 Railroads	5 PCTIP	267 hours	1,335

CFR Section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
Notification of Failure to File Joint PTCIP.	38 Railroads	1 notification	32 hours	32
Comprehensive List of Issues Causing Non-Agreement.	38 Railroads	1 list	80 hours	80
Conferences to Develop Mutually Acceptable PCTIP.	38 Railroads	1 conf. call	60 minutes	1
Annual Implementation Status Report.	38 Railroads	38 reports + 38 reports	8 hours + 60 hours	2,584
Type Approval	38 Railroads	2 Type Appr.	8 hours	16
PTC Development Plans Requesting Type Approval.	38 Railroads	20 Ltr. + 20 App.; 2 Plans	8 hours/1600 hrs; 6,400 hours.	44,960
Notice of Product Intent w/ PTCIPs (IPs).	38 Railroads	3 NPI; 1 IP	1,070 + 535 hrs	3,745
PTCDPs with PTCIPs (DPs + IPs).	38 Railroads	1 DP	2,135 hours	2,135
Updated PTCIPs w/PTCDPs (IPs + DPs).	38 Railroads	1 IP; 1 DP	535 + 2,135 hrs	2,670
Disapproved/Resubmitted PTCIPs/NPIs.	38 Railroads	1 IP + 1 NPI	135 + 270 hrs	405
Revoked Approvals—Provisional IPs/DP.	38 Railroads	IP + 1 DP	135 + 535 hrs	670
PTC IPs/PTCDPs Still Needing Rework.	38 Railroads	1 IP + 1 DP	135 + 535 hrs	670
PTCIP/PTCDP/PTCSP Plan Contents—Documents Translated into English.	38 Railroads	1 document	8,000 hours	8,000
Requests for Confidentiality	38 Railroads	38 ltrs; 38 docs	8 hrs; 800 hrs	30,704
Field Test Plans/Independent Assessments—Req. by FRA.	38 Railroads	190 field tests; 2 assessments	800 hours	153,600
FRA Access: Interviews with PTC Wrkrs..	38 Railroads	76 interviews	30 minutes	38
FRA Requests for Further Information.	38 Railroads	8 documents	400 hours	3,200
236.1011: PTCIP Requirements—Comment.	7 Interested Groups	1 rev.; 40 com	143 + 8 hrs.	463
236.1015: PTCSP Content Requirements & PTC System Certification.				
Non-Vital Overlay	38 Railroads	3 PTCSPs	16,000 hours	48,000
Vital Overlay	38 Railroads	28 PTCSPs	22,400 hours	627,200
Stand Alone	38 Railroads	1 PTCSP	32,000 hours	32,000
Mixed Systems—Conference with FRA regarding Case/Analysis.	38 Railroads	3 conferences	32 hours	96
Mixed Sys. PTCSPs (incl. safety case).	38 Railroads	1 PTCSP	28,800 hours	28,800
FRA Request for Additional PTCSP Data.	38 Railroads	19 documents	3,200 hours	60,800
PTCSPs Applying to Replace Existing Certified PTC Systems.	38 Railroads	19 PTCSPs	3,200 hours	60,800
Non-Quantitative Risk Assessments Supplied to FRA.	38 Railroads	19 assessments	3,200 hours	60,800
236.1017: PTCSP Supported by Independent Third Party Assessment.	38 Railroads	1 assessment	8,000 hours	8,000
Written Requests to FRA to Confirm Entity Independence.	38 Railroads	1 request	8 hours	8
Provision of Additional Information After FRA Request.	38 Railroads	1 document	160 hours	160
Independent Third Party Assessment: Waiver Requests.	38 Railroads	1 request	160 hours	160
RR Request for FRA to Accept Foreign Railroad Regulator Certified Info.	38 Railroads	1 request	32 hours	32
236.1019: Main Line Track Exceptions.				
Submission of Main Line Track Exclusion Addendums (MTEAs).	38 Railroads	36 MTEAs	160 hours	5,760

CFR Section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
Passenger Terminal Exception—MTEAs.	38 Railroads	19 MTEAs	160 hours	3,040
Limited Operation Exception—Risk Mit.	38 Railroads	19 plans	160 hours	3,040
Ltd. Exception—Collision Hazard Anal.	38 Railroads	12 analyses	1,600 hours	19,200
Temporal Separation Procedures.	38 Railroads	11 procedures	160 hours	1,760
236.1021: Discontinuances, Material Modifications, Amendments—Requests to Amend (RFA) PTCIP, PTCDP or PTCSP.	38 Railroads	19 RFAs	160 hours	3,040
Review and Public Comment on RFA.	7 Interested Groups	7 reviews + 20 comments	3 hours; 16 hours	341
236.1023: PTC Product Vendor Lists.	38 Railroads	38 lists	8 hours	304
RR Procedures Upon Notification of PTC System Safety-Critical Upgrades, Rev., Etc.	38 Railroads	38 procedures	16 hours	608
RR Notifications of PTC Safety Hazards.	38 Railroads	142 notifications	16 hours	2,272
RR Notification Updates	38 Railroads	142 updates	16 hours	2,272
Manufacturer's Report of Investigation of PTC Defect.	5 System Suppliers	5 reports	400 hours	2,000
PTC Supplier Reports of Safety Relevant Failures or Defective Conditions.	5 System Suppliers	142 reports + 142 rpt. copies.	16 hours + 8 hours	3,408
236.1029: Report of On-Board Lead Locomotive PTC Device Failure.	38 Railroads	836 reports	96 hours	80,256
236.1031: Previously Approved PTC Systems.				
Request for Expedited Certification (REC) for PTC System.	38 Railroads	3 REC Letters	160 hours	480
Requests for Grandfathering on PTCSPs.	38 Railroads	3 requests	1,600 hours	4,800
236.1035: Field Testing Requirements.	38 Railroads	190 field test plans	800 hours	152,000
Relief Requests from Regulations Necessary to Support Field Testing.	38 Railroads	38 requests	320 hours	12,160
236.1037: Records Retention.				
Results of Tests in PTCSP and PTCDP.	38 Railroads	836 records	4 hours	3,344
PTC Service Contractors Training Records.	38 Railroads	18,240 records	30 minutes	9,120
Reports of Safety Relevant Hazards Exceeding Those in PTCSP and PTCDP.	38 Railroads	4 reports	8 hours	32
Final Report of Resolution of Inconsistency.	38 Railroads	4 final reports	160 hours	640
236.1039: Operations & Maintenance Manual (OMM): Development.	38 Railroads	38 manuals	250 hours	9,500
Positive Identification of Safety-critical components.	38 Railroads	114,000 i.d. components	1 hour	114,000
Designated RR Officers in OMM. regarding PTC issues.	38 Railroads	76 designations	2 hours	152
236.1041: PTC Training Programs	38 Railroads	38 programs	400 hours	15,200
236.1043: Task Analysis/Basic Requirements: Training Evaluations.	38 Railroads	38 evaluations	720 hours	27,360
Training Records	38 Railroads	560 records	10 minutes	93
236.1045: Training Specific to Office Control Personnel.	38 Railroads	32 trained employees	20 hours	640
236.1047: Training Specific to Loc. Engineers & Other Operating Personnel.				

CFR Section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
PTC Conductor Training	38 Railroads	7,600 trained conductors	3 hours	22,800

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. Pursuant to 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning: whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, Information Clearance Officer, at 202–493–6292, or Ms. Nakia Jackson at 202–493–6073.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Mr. Robert Brogan or Ms. Kimberly Toone, Federal Railroad Administration, 1200 New Jersey Avenue SE., 3rd Floor, Washington, DC 20590. Comments may also be submitted via email to Mr. Brogan or Ms. Toone at the following address: *Robert.Brogan@dot.gov*; *Kimberly.Toone@dot.gov*.

OMB is required to make a decision concerning the collection of information requirements contained in this proposed rule between 30 and 60 days after its publication in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

FRA is not authorized to impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of the final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

D. Federalism Implications

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, ''Federalism.'' *See* 64 FR 43,255 (Aug. 4, 1999). As discussed earlier in the preamble, this proposed rule would provide regulatory relief from the mandated implementation of PTC systems.

Executive Order 13132 requires FRA to develop a process to ensure ''meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications.'' Policies that have ''federalism implications'' are defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts state law, the agency seeks to consult with State and local officials in the process of developing the regulation.

FRA has determined that this proposed rule would not have substantial direct effects on the States, on the relationship between the national government and the States, nor on the distribution of power and responsibilities among the various levels of government. In addition, FRA has determined that this proposed rule would not impose any direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

However, this proposed rule will have preemptive effect. Section 20106 of Title 49 of the United States Code provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the local safety or security exception to § 20106. Furthermore, the Locomotive Boiler Inspection Act (49 U.S.C. 20701–20703) has been held by the U.S. Supreme Court to preempt the entire field of locomotive safety.

In sum, FRA has analyzed this proposed rule in accordance with the principles and criteria contained in Executive Order 13132. As explained above, FRA has determined that this proposed rule has no federalism implications, other than the possible preemption of State laws. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this proposed rule is not required.

E. Environmental Impact

FRA has evaluated this proposed rule in accordance with its ''Procedures for Considering Environmental Impacts'' (''FRA's Procedures'') (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 et seq.), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this proposed rule is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this proposed rule is not a major Federal action significantly affecting the quality of the human environment.

F. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531) (UMRA) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a federal mandate likely to result in the expenditures by

state, local or tribal governments, in the aggregate, or by the private sector, of $100 million (adjusted annually for inflation with base year of 1995) or more in any one year. The value equivalent of $100 million in CY 1995, adjusted annual for inflation to CY 2008 levels by the Consumer Price Index for All Urban Consumers (CPI–U) is $141.3 million. The assessment may be included in conjunction with other assessments, as it is in this rulemaking.

FRA is publishing this NPRM to provide additional flexibility in standards for the development, testing, implementation, and use of PTC systems for railroads mandated by RSIA to implement PTC systems. The RIA provides a detailed analysis of the costs and benefits of the NPRM. This analysis is the basis for determining that this rule will not result in total expenditures by State, local or tribal governments, in the aggregate, or by the private sector of $141.3 million or more in any one year. The costs associated with this NPRM are reduced accident reduction from an existing rule. The aforementioned costs borne by all parties will not exceed $3.3 million in any one year.

G. Energy Impact

Executive Order 13211 requires federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.'' 66 FR 28355 (May 22, 2001). Under the Executive Order, a ''significant energy action'' is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this proposed rule in accordance with Executive Order 13211. FRA has determined that this proposed rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a ''significant regulatory action'' within the meaning of Executive Order 13211.

H. Privacy Act

FRA wishes to inform all interested parties that anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document), if submitted on behalf of an association, business, labor union, etc.). Interested parties may also review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or visit *http://www.regulations.gov/#!privacyNotice*.

List of Subjects

49 CFR Part 234

Highway safety, Highway-rail grade crossings, Penalties, Railroad safety, Reporting and recordkeeping requirements.

49 CFR Part 235

Administrative practice and procedure, Penalties, Railroad safety, Reporting and recordkeeping requirements.

49 CFR Part 236

Penalties, Positive Train Control, Railroad safety, Reporting and recordkeeping requirements.

The Proposed Rule

In consideration of the foregoing, FRA is proposing to amend chapter II, subtitle B of title 49, Code of Federal Regulations as follows:

PART 234—[AMENDED]

1. The authority citation for part 234 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107; 28 U.S.C. 2461, note; and 49 CFR 1.49.

2. Amend § 234.207 by revising paragraph (b) to read as follows:

§ 234.207 Adjustment, repair, or replacement of component.

* * * * *

(b) If the failure of an essential component results in an activation failure, partial activation, or false activation, as defined in § 234.5, a railroad shall take appropriate action under § 234.105, Activation failure, § 234.106, Partial activation, or § 234.107, False activation, of this part, until repair of the essential component is completed.

3. Revise § 234.213 to read as follows:

§ 234.213 Grounds.

Each circuit that affects the proper functioning of a highway-rail grade crossing warning system shall be kept free of any ground or combination of grounds having a current flow of any amount that could adversely affect the proper safety-critical functioning of the warning system, including any ground or combination of grounds that will permit a current flow of 75 percent or more of the release value of any relay or electromagnetic device in the circuit. This requirement does not apply to: circuits that include track rail; alternating current power distribution circuits that are grounded in the interest of safety; and common return wires of grounded common return single break circuits.

PART 235—[AMENDED]

5. The authority citation for part 235 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107; 28 U.S.C. 2461, note; and 49 CFR 1.49.

6. Amend § 235.7 by adding paragraph (d) to read as follows:

§ 235.7 Changes not requiring filing of application.

* * * * *

(d) In lieu of filing an application for approval to the Associate Administrator for Safety, modifications of a signal system where the resultant arrangement will comply with part 236 of this title consisting of the installation, relocation, or removal of signals, interlocked switches, derails, movable-point frogs, or electric locks in an existing system, directly associated with the implementation of positive train control pursuant to subpart I of part 236, may instead be approved by the FRA Regional Administrator having jurisdiction over the affected territory. To seek such approval, the railroad shall provide notice and a profile plan of the change to the appropriate FRA regional office. The railroad shall also at the same time provide a copy of the notice and profile plan to representatives of employees responsible for maintenance, inspection, and testing of the signal system under part 236. The Regional Administrator shall in writing deny or approve, in full or in part, and with or without conditions, the request for signal system modification. For any portion of the request that is denied, the Regional Administrator will refer the issue to the Railroad Safety Board as an application to modify the signal system.

PART 236—[AMENDED]

7. The authority citation for part 236 continues to read as follows:

Authority: 49 U.S.C. 20102–20103, 20107, 20133, 20141, 20157, 20301–20303, 20306, 21301–21302, 21304; 28 U.S.C. 2461, note; and 49 CFR 1.49.

§ 236.0 [Amended]

8. Amend § 236.0 by removing and reserving paragraph (i).

9. Revise § 236.2 to to read as follows:

§ 236.2 Grounds.

Each circuit, the functioning of which affects the safety of train operations, shall be kept free of any ground or combination of grounds having a current flow of any amount that could adversely affect the proper safety-critical functioning of a signal or train control system, including any ground or combination of grounds that will permit a flow of current equal to or in excess of 75 percent of the release value of any relay or other electromagnetic device in the circuit, except circuits which include any track rail and except the common return wires of single-wire, single-break, signal control circuits using a grounded common, and alternating current power distribution circuits which are grounded in the interest of safety.

10. Revise § 236.15 to read as follows:

§ 236.15 Timetable instructions.

Automatic block, traffic control, train stop, train control, cab signal, and positive train control territory shall be designated in timetable instructions.

11. Revise § 236.567 to read as follows:

§ 236.567 Restrictions imposed when device fails and/or is cut out en route.

(a) Where an automatic train stop, train control, or cab signal device fails and/or is cut out en route, the train on which the device is inoperative may proceed to the next available point of communication where report must be made to a designated officer, at speeds not to exceed:

(1) If no block signal system is in operation, restricted speed; or

(2) If a block signal system is in operation, according to signal indication but not to exceed medium speed.

(b) Upon completion and communication of the report required in paragraph (a) of this section, a train may continue to a point where an absolute block can be established in advance of the train at speeds not to exceed:

(1) If no block signal system is in operation, restricted speed; or

(2) If a block signal system is in operation, according to signal indication but not to exceed medium speed.

(c) Upon reaching the location where an absolute block has been established in advance of the train, as referenced in paragraph (b) of this section, the train may proceed at speeds not to exceed:

(1) If no block signal system is in operation:

(i) If the train is a passenger train, 59 miles per hour; or

(ii) If the train is a freight train, 49 miles per hour.

(2) If a block signal system is in operation, 79 miles per hour.

12. Amend § 236.1005 by revising the heading of table in paragraph (a)(1)(i), and paragraphs (b)(4)(iii)(A), (b)(4)(iii)(B)(*3*), (b)(4)(iii)(B)(*4*), and (b)(4)(iii)(C) to read as follows:

§ 236.1005 Requirements for Positive Train Control systems.

(a) * * *

(1) * * *

(i) * * *

Crossing type	Max speed	Protection required

* * * * *

(b) * * *

(4) * * *

(iii) *Freight lines with de minimis risk.* (A) In a PTCIP or RFA, a railroad may request review of the requirement to install PTC on a low density track segment where a PTC system is otherwise required by this section, but has not yet been installed, based upon the presence of a minimal quantity of PIH materials (less than 200 cars per year, loaded and residue, with no more than two trains carrying PIH materials over the track segment each calendar day). Any such request shall be accompanied by estimated traffic projections for the next 5 years (e.g., as a result of planned rerouting, coordinations, or location of new business on the line). Where the request involves prior or planned rerouting of PIH materials traffic, the railroad must provide the information and analysis identified in paragraph (b)(4)(i) of this section. The submission shall also include a full description of potential safety hazards on the segment of track and fully describe train operations over the line. This provision is not applicable to lines segments used by intercity or commuter passenger service.

(B) * * *

(*3*) That does not have any portion of the segment with an average grade of one percent or greater over a distance of three continuous miles; and

(*4*) On which any train transporting a car containing PIH materials (including a residue car) is operated under conditions of temporal separation from other trains using the line segment as documented by a temporal separation plan accompanying the request. As used in this paragraph, ''temporal separation'' has the same meaning given by § 236.1019(e), except that the separation addressed is the separation of a train carrying any number of cars containing PIH materials from other freight trains. In lieu of temporal separation, a railroad may employ, subject to FRA approval, an alternative means of similarly reducing the risk of PTC-preventable accidents and a release of PIH materials.

(C) FRA will also consider, and may approve, requests for relief under this paragraph for additional line segments where it is established to the satisfaction of the Associate Administrator that risk mitigations will be applied that will ensure that the risk of PTC-preventable accidents and a release of PIH materials is negligible.

* * * * *

13. Amend § 236.1006 by revising paragraphs (a) and (b)(2) and adding paragraph (b)(5) to read as follows:

§ 236.1006 Equipping locomotives operating in PTC territory.

(a) Except as provided in paragraph (b) of this section, each operation on any track segment equipped with a PTC system shall be controlled by a locomotive equipped with an onboard PTC apparatus that is fully operative and functioning in accordance with the applicable PTCSP approved under this subpart.

(b) * * *

(2) Each railroad shall adhere to its PTCIP.

* * * * *

(5) Yard moves. In a PTCSP or an RFA, a railroad may request a yard move *de minimis* risk exception to operate a locomotive without an onboard PTC apparatus installed where an onboard PTC apparatus is otherwise required by this part. This exception only applies to a locomotive engaged in switching service or engaged in transfer train service that originates either in the yard or that originates within 10 miles of the yard with a final destination point being the yard.

(i) Each such operation must include sufficient risk mitigations to ensure that the risk of PTC-preventable accidents and a release of PIH materials is negligible;

(ii) The locomotive shall not travel to a point in excess of 10 miles from its point of entry onto the PTC-equipped main line track; and

(iii) The speed of the locomotive or train shall not exceed 25 miles per hour.

* * * * *

14. Amend § 236.1009 by adding paragraph (a)(5) to read as follows:

§ 236.1009 Procedural requirements.

(a) * * *

(5) Each railroad filing a PTCIP shall report annually, on the anniversary of its original PTCIP submission, and until its PTC system implementation is complete, its progress towards fulfilling the goals outlined in its PTCIP under this section, including progress towards PTC system installation pursuant to § 236.1005 and onboard PTC apparatus

installation and use in PTC-equipped track segments pursuant to § 236.1006.

* * * * *

15. Amend § 236.1029 by revising paragraph (b) introductory text and adding paragraph (g) to read as follows:

§ 236.1029 PTC system use and en route failures.

* * * * *

(b) Where an onboard PTC apparatus on a lead locomotive that is operating in or is to be operated within a PTC system fails or is otherwise cut-out after the train has departed its initial terminal, the train may only continue in accordance with the following:

* * * * *

(g) Where full functionality of an onboard PTC apparatus on a controlling locomotive that is operating within a PTC system is restored through use of a secondary apparatus, such as an onboard PTC apparatus in a trailing locomotive, the train may continue operations as specified in the railroad's PTCSP. The process for such restoration of functionality shall be specified in a railroad's PTCSP.

Issued in Washington, DC, on November 29, 2012.

Joseph C. Szabo,

Administrator.

[FR Doc. 2012–29334 Filed 12–10–12; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

RIN 0648–BB29

Atlantic Highly Migratory Species; 2006 Consolidated Highly Migratory Species Fishery Management Plan; Amendment 5

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public hearings.

SUMMARY: On November 26, 2012, NMFS published a proposed rule for Amendment 5 to the 2006 Consolidated Highly Migratory Species (HMS) Fishery Management Plan (FMP) in response to several shark stock assessments that were completed from 2009 to 2012. As described in the proposed rule, NMFS is proposing measures that would reduce fishing mortality and effort in order to rebuild overfished Atlantic shark species while ensuring that a limited sustainable shark fishery can be maintained consistent with our legal obligations. The proposed measures include changes to commercial quotas and species groups, the creation of several time/area closures, a change to an existing time/area closure, an increase in the recreational minimum size restrictions, and the establishment of recreational reporting for certain species of sharks. Comments received by NMFS will be considered in the development and finalization of Amendment 5 to the 2006 Consolidated HMS FMP. This notice announces public hearings, conference calls, and an HMS Advisory Panel meeting to discuss the proposed rule.

DATES: Written comments will be accepted until February 12, 2013. Public hearings, conference calls, and an HMS Advisory Panel meeting for the Amendment 5 proposed rule will be held from December 2012 to February 2013. See **SUPPLEMENTARY INFORMATION** for meeting dates, times, and locations.

ADDRESSES: Public hearings will be held in Massachusetts, New Jersey, North Carolina, Florida, and Louisiana, and via phone call/webinar. NMFS will hold an HMS Advisory Panel meeting in Maryland. See **SUPPLEMENTARY INFORMATION** for dates, times, and locations.

You may submit comments on this document, identified by NOAA–NMFS–2012–0161, by any of the following methods:

- *Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal *www.regulations.gov*. To submit comments via the e-Rulemaking Portal, first click the ''submit a comment'' icon, then enter NOAA–NMFS–2012–0161 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the ''Submit a Comment'' icon on the right of that line.
- *Mail:* Submit written comments to Peter Cooper, 1315 East-West Highway, Silver Spring, MD 20910. Please mark the outside of the envelope ''Comments on the Draft Amendment 5 to the 2006 Consolidated HMS FMP.''
- *Fax:* 301–713–1917; Attn: Peter Cooper.

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and generally will be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Peter Cooper, Guý DuBeck, Michael Clark, or Karyl Brewster-Geisz at 301–427–8503.

SUPPLEMENTARY INFORMATION: The Atlantic shark fisheries are managed under the Magnuson-Stevens Act. Management of these species is described in the 2006 Consolidated HMS FMP, which is implemented by regulations at 50 CFR part 635. Copies of the 2006 Consolidated HMS FMP and amendments are available from NMFS on request (see **FOR FURTHER INFORMATION CONTACT**).

On November 26, 2012 (77 FR 70552), NMFS published a proposed rule for draft Amendment 5 to the 2006 Consolidated HMS FMP based on several shark stock assessments that were completed from 2009 to 2012. The assessments for Atlantic blacknose, dusky, and scalloped hammerhead sharks indicated that these species are overfished and experiencing overfishing. As described in the proposed rule, NMFS is proposing measures that would reduce fishing mortality and effort in order to rebuild overfished Atlantic shark species while ensuring that a limited sustainable shark fishery can be maintained consistent with our legal obligations and the 2006 Consolidated HMS FMP. The proposed measures include changes to commercial quotas and species groups, the creation of several time/area closures, a change to an existing time/area closure, an increase in the recreational minimum size restrictions, and the establishment of recreational reporting for certain species of sharks. Any comments received during the comment period will be considered in the development and finalization of Amendment 5 to the 2006 Consolidated HMS FMP.

Request for Comments

Six public hearings will be held in Florida (2), Louisiana, Massachusetts, New Jersey, and North Carolina to

provide the opportunity for public comment on the measures described in the proposed rule and draft Amendment 5. NMFS will also hold two public conference calls/webinars to provide individuals opportunity to submit public comment if they are unable to attend a public hearing.

NMFS expects to consult with the HMS Advisory Panel on January 8, 2013, on the proposed rule and draft Amendment 5. This HMS Advisory Panel meeting will consist of a presentation of the proposed measures followed by a discussion with the Advisory Panel. There will also be an opportunity for public comment in an open session after the Advisory Panel discussion. See Table 1 for times, dates, and location.

NMFS has also asked to present information on the proposed rule and draft Amendment 5 to the Caribbean, Gulf of Mexico, South Atlantic, Mid-Atlantic, and New England Fishery Management Councils. Information on the date and time of those presentations will be provided on the appropriate council agenda.

TABLE 1—DATES, TIMES AND LOCATIONS OF UPCOMING PUBLIC HEARINGS, CONFERENCE CALLS, AND HMS ADVISORY PANEL MEETING

Venue	Date/time	Meeting locations	Location contact information
HMS Advisory Panel Meeting	January 8, 2013, 10 a.m.–3 p.m.	Silver Spring, MD	Silver Spring Civic Center, One Veteran's Place, Silver Spring, MD 20910, (240) 777–5350.
Conference call/Webinar	January 9, 2013, 1 p.m.–4 p.m.		To participate in conference call, call: (888) 469–2979, Passcode: 2809363, To participate in webinar, RSVP at: *https://www1.gotomeeting.com/register/74030603,* A confirmation email with webinar log-in information will be sent after RSVP is registered.
Public Hearing	January 17, 2013, 5 p.m.–8 p.m.	Vero Beach, FL	Vero Beach Community Center, 2266 14th Avenue, Vero Beach, FL 32960, (772) 770–6517.
Public Hearing	January 15, 2013, 4 p.m.–7 p.m.	Madeira Beach, FL	Gulf Beaches Public Library, 100 Municipal Drive, Madeira Beach, FL 33708, (727) 391–2828.
Public Hearing	January 22, 2013, 5 p.m.–8 p.m.	Manalapan, NJ	Monmouth County Public Library—Headquarters, 125 Symmes Road, Manalapan, NJ 07726, (732) 431–7220.
Public Hearing	January 24, 2013, 5 p.m.–8 p.m.	Manteo, NC	Commissioner's Meeting Room, Dare County Administration Building, 954 Marshall C. Collins Drive, Manteo, NC 27954.
Public Hearing	January 30, 2013, 5 p.m.–8 p.m.	Gloucester, MA	NOAA Fisheries Service, 55 Great Republic Drive, Gloucester, MA.
Public Hearing	February 7, 2013, 5 p.m.–8 p.m.	Belle Chasse, LA	Belle Chasse Auditorium, 8398 Hwy 23, Belle Chasse, LA 70037.
Conference Call	February 5, 2013, 5 p.m.–8 p.m.		To participate in conference call, call: (888) 469–2979, Passcode: 2809363, To participate in webinar, RSVP at: *https://www1.gotomeeting.com/register/623300105,* A confirmation email with webinar log-in information will be sent after RSVP is registered.

NMFS welcomes comments on any aspect or alternative considered in the proposed rule. NMFS is specifically seeking comments on the administration of dusky shark bycatch caps program in select areas given limited additional observer program resources; the name of reconfigured groupings of sharks that would continue to be managed collectively in the reminder of what is currently the large coastal shark complex for quota monitoring purposes; suggestions for improving angler identification of shark species and reducing dusky shark mortality in the recreational fishery; and whether NMFS should permit the transit of closed areas if certain otherwise prohibited gear is properly stowed and inoperable.

Public Hearing Code of Conduct

The public is reminded that NMFS expects participants at public hearings and on phone conferences to conduct themselves appropriately. At the beginning of each meeting, a representative of NMFS will explain the ground rules (e.g., alcohol is prohibited from the meeting room; attendees will be called to give their comments in the order in which they registered to speak; each attendee will have an equal amount of time to speak; attendees may not interrupt one another; etc.). The NMFS representative will structure the meeting so that all attending members of the public will be able to comment, if they so choose, regardless of the controversial nature of the subject(s). Attendees are expected to respect the ground rules, and those that do not will be asked to leave the meeting.

Authority: 16 U.S.C. 971 *et seq.;* 16 U.S.C. 1801 *et seq.*

Dated: December 5, 2012.

Emily H. Menashes,

Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2012–29899 Filed 12–10–12; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 77, No. 238
Tuesday, December 11, 2012

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

AGENCY FOR INTERNATIONAL DEVELOPMENT

Notice of Public Information Collection Requirements Submitted to OMB for Review

SUMMARY: U.S. Agency for International Development (USAID) has submitted the following information collection to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding this information collection are best assured of having their full effect if received within 30 days of this notification. Comments should be addressed to: Desk Officer for USAID, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20503. Copies of submission may be obtained by calling (202) 712–1365.

SUPPLEMENTARY INFORMATION:

OMB Number: OMB 0412–XXXX.

Form Number: N/A.

Title: Web site Modernization Pop-up Survey.

Type of Submission: A New Information Collection.

Purpose: Improving agency programs requires ongoing assessment of service delivery, by which we mean systematic review of the operation of a program compared to a set of explicit or implicit standards, as a means of contributing to the continuous improvement of the program. The Agency will collect, analyze, and interpret information gathered through this generic clearance to identify strengths and weaknesses of current services and make improvements in service delivery based on feedback. The solicitation of feedback will target areas such as: Timeliness, appropriateness, accuracy of information, courtesy, efficiency of service delivery, and resolution of issues with service delivery. Responses will be assessed to plan and inform efforts to improve or maintain the quality of service offered to the public. If this information is not collected, vital feedback from customers and stakeholders on the Agency's services will be unavailable.

Annual Reporting Burden

Respondents: 500.

Total annual responses: 500.

Total annual hours requested: 41 hours.

Date: December 4, 2012.

Lynn Winston,

Chief, Information and Records Division, U.S. Agency for International Development.

[FR Doc. 2012–29644 Filed 12–10–12; 8:45 am]

BILLING CODE 6116–01–M

AGENCY FOR INTERNATIONAL DEVELOPMENT

Notice of Public Information Collections Being Reviewed by the U.S. Agency for International Development; Comments Requested

SUMMARY: U.S. Agency for International Development (USAID) is making efforts to reduce the paperwork burden. USAID invites the general public and other Federal agencies to take this opportunity to comment on the following proposed and/or continuing information collections, as required by the Paperwork Reduction Act for 1995. Comments are requested concerning: (a) Whether the proposed or continuing collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Submit comments on or before February 11, 2013.

FOR FURTHER INFORMATION CONTACT: Sylvia Joyner, Bureau for Management, Office of Management Services, Information and Records Division, U.S. Agency for International Development, Room 2.07C, RRB, Washington, DC, 20523, (202) 712–5007 or via email *sjoyner@usaid.gov.*

ADDRESSES: Send comments via email at *jltaylor@usaid.gov,* U.S. Agency for International Development, Office of Acquisition and Assistance, 1300 Pennsylvania Avenue NW., SA–44 Room 897–C, Washington DC 20523, 202–712–1752.

SUPPLEMENTARY INFORMATION:

OMB No: OMB 0412–0549.

Form No.: AID 302–3.

Title: Offeror Information for Personnel Services Contracts.

Type of Review: A New Information Collection.

Purpose: United States Agency for International Development must collect information for reporting purposes to Congress and Office of Acquisition and Assistance Contract Administration. This collection is to gather information from applicants applying for personal services contractor positions. This form will be utilized to collect information to determine the most qualified person for a position without gathering information which may lead to discrimination or bias information towards or gathered from applicant.

Annual Reporting Burden

Respondents: 5000.

Total annual responses: 10,000.

Total annual hours requested: 10,000 hours.

Dated: December 4, 2012.

Lynn Winston,

Information and Records Division, U.S. Agency for International Development.

[FR Doc. 2012–29647 Filed 12–10–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

December 6, 2012.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be

collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food and Nutrition Service

Title: Negative Quality Control Review Schedule.

OMB Control Number: 0584–0034.

Summary of Collection: The legislative basis for the operation of the quality control system is provided by section 16 of the Food and Nutrition Act of 2008. State agencies are required to perform Quality Control (QC) reviews for the Supplemental Nutrition Assistance Program (SNAP). Section 275.21 requires State agencies to submit reports to enable the Food and Nutrition Service (FNS) to monitor their compliance with Program requirements relative to the Quality Control Review System. FNS will collect information using forms FNS–245 *Negative Case Action Review Schedule.*

Need and Use of the Information: FNS will collect information to record data in negative case reviews. Negative case actions include the denial, termination or suspension of benefits. If the information were not collected, it would delay the awarding of monetary incentives in which the negative error rate played a role.

Description of Respondents: State, Local, or Tribal Government.

Number of Respondents: 53.

Frequency of Responses: Recordkeeping; Reporting: On occasion; Annually.

Total Burden Hours: 120,812.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2012–29881 Filed 12–10–12; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2012–0093]

Notice of Request for Extension of Approval of an Information Collection; Introduction of Organisms and Products Altered or Produced Through Genetic Engineering

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with the regulations for the introduction of organisms and products altered or produced through genetic engineering.

DATES: We will consider all comments that we receive on or before February 11, 2013.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2012-0093-0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2012–0093, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2012-0093* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information regarding the regulations for the introduction of organisms and products altered or produced through genetic engineering, contact Ms. Cynthia A. Eck, Document Control Officer, Regulatory Operations Programs, BRS, APHIS, 4700 River Road Unit 91, Riverdale, MD 20737; (301) 851–3892. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

SUPPLEMENTARY INFORMATION:

Title: 7 CFR part 340; Introduction of Organisms and Products Altered or Produced Through Genetic Engineering.

OMB Number: 0579–0085.

Type of Request: Extension of approval of an information collection.

Abstract: Under the Plant Protection Act (PPA, 7 U.S.C. 7701 *et seq.*), the Secretary of Agriculture is authorized to prohibit or restrict the importation, entry, or movement in interstate commerce of any plant, plant product, biological control organism, noxious weed, article, or means of conveyance, if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction or the dissemination of a plant pest into the United States.

Under that authority, the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) has established regulations in 7 CFR part 340, ''Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There Is Reason to Believe Are Plant Pests.'' The regulations govern the introduction (importation, interstate movement, or release into the environment) of covered genetically engineered organisms and products (''regulated articles''). A permit must be obtained or a notification acknowledged before a regulated article may be introduced.

The regulations set forth the permit application requirements and the notification procedures for the importation, interstate movement, or release into the environment of a regulated article and necessitate certain information and recordkeeping requirements, including APHIS-issued permits, applicants' field testing records, and the submission of protocols to ensure compliance.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.945142857 hours per response.

Respondents: Applicants from agricultural companies.

Estimated annual number of respondents: 121.

Estimated annual number of responses per respondent: 29.

Estimated annual number of responses: 3,500.

Estimated total annual burden on respondents: 3,308 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 6th day of December 2012.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2012–29882 Filed 12–10–12; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2012–0085]

Notice of Request for Revision to and Extension of Approval of an Information Collection; APHIS Online Reporting Form

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Revision to and extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request a revision to and extension of approval of an information collection that allows the public to report sightings of plant pests and diseases.

DATES: We will consider all comments that we receive on or before February 11, 2013.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS–2012–0085–0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2012–0085, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS–2012–0085* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information on the APHIS Online Reporting Form, contact Ms. Heather Curlett, Outreach and Risk Communications Coordinator, PPQ, APHIS, 4700 River Road Unit 130, Riverdale MD 20737; (301) 851–2294. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

SUPPLEMENTARY INFORMATION:

Title: APHIS Online Reporting Form.

OMB Number: 0579–0311.

Type of Request: Revision to and extension of approval of an information collection.

Abstract: As authorized by the Plant Protection Act (U.S.C. 7701 *et seq.*) (PPA), the Animal and Plant Health Inspection Service (APHIS), either independently or in cooperation with States, may carry out operations or measures to detect, eradicate, suppress, control, prevent, or retard the spread of plant pests and diseases that are new to or not widely distributed within the United States. This authority allows APHIS to establish control programs for a number of pests and diseases of concern, including Asian longhorned beetle (ALB), emerald ash borer beetle, and citrus greening, to name a few.

APHIS relies on the public to report sightings of pests of concern or suspicious signs of pest or disease damage they may see in their local area. This reporting is currently done through a simple voluntary online form currently used to obtain reports from the public on sightings or signs of ALB. Reports can come from areas that are under regulatory oversight and those areas where no regulatory oversight currently exists. Surveys performed by members of the general public, nature organizations, school groups, garden clubs, and others help APHIS uncover unknown infestations. In fact, surveys conducted by the public supplement the work done by the Agency's surveyors.

The current online form is used to obtain reports from the public on signs or sightings of ALB. This information collection activity was approved by the Office of Management and Budget (OMB) under control number 0579–0311. However, since the form allows the public to only enter information concerning ALB, APHIS is expanding the form to enable the public to submit reports about a variety of pests and diseases. This information will be used to identify new or expanded outbreaks of pests and diseases of concern. The reports, as they are collected, will be transmitted to the appropriate officials in APHIS' Plant Protection and Quarantine program for follow-up, including onsite inspections by APHIS officials or State department of agriculture plant pest experts. Follow-up questions or details on location will be obtained by contacting the respondent for more information and directions.

We are asking OMB to approve our use of this information collection activity for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the information collection on those who are to respond, through use, as appropriate, of automated, electronic, mechanical,

and other collection technologies; e.g., permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.083 hours per response.

Respondents: General public, nature organizations, school groups, and garden clubs.

Estimated annual number of respondents: 5,000.

Estimated annual number of responses per respondent: 1.

Estimated annual number of responses: 5,000.

Estimated total annual burden on respondents: 415 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 6th day of December 2012.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2012–29886 Filed 12–10–12; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2012–0086]

Notice of Request for Extension of Approval of an Information Collection; Permanent, Privately Owned Horse Quarantine Facilities

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with regulations for permanent, privately owned horse quarantine facilities.

DATES: We will consider all comments that we receive on or before February 11, 2013.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS–2012–0086–0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2012–0086, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS–2012–0086* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information on the regulations for permanent, privately owned horse quarantine facilities, contact Dr. Ellen Buck, Staff Veterinary Medical Officer, Equine Imports, National Center for Import and Export, VS, 4700 River Road Unit 39, Riverdale, MD 20737; (301) 851–3361. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

SUPPLEMENTARY INFORMATION:

Title: Permanent, Privately Owned Horse Quarantine Facilities.

OMB Number: 0579–0313.

Type of Request: Extension of approval of an information collection.

Abstract: Under the Animal Health Protection Act (7 U.S.C. 8301 et seq.), the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture is authorized, among other things, to prohibit or restrict the importation and interstate movement of animals and animal products to prevent the introduction into and dissemination within the United States of livestock diseases and pests. To carry out this mission, APHIS regulates the importation of animals and animal products into the United States based on the regulations in parts 92 through 98 of Title 9, Code of Federal Regulations (9 CFR).

The regulations in 9 CFR part 93 require, among other things, that certain animals, as a condition of entry, be quarantined upon arrival in the United States. APHIS operates animal quarantine facilities and also authorizes the use of quarantine facilities that are privately owned and operated for certain animal importations.

The regulations in subpart C of part 93 pertain to the importation of horses and include requirements for privately owned quarantine facilities for horses. For permanent, privately owned quarantine facilities, these requirements entail certain information collection activities, including environmental certification, application for facility approval, service agreements, requests to APHIS concerning withdrawal of approval, notification to APHIS of facility closure, compliance agreements, security procedures, alarm notification, lists of personnel, signed statements, daily logs, and requests for variance.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.80952 hours per response.

Respondents: Applicants who apply for facility approval; owners and operators of permanent, privately owned horse quarantine facilities; facility employees; authorities who issue environmental certifications; and employees of security companies.

Estimated annual number of respondents: 6.

Estimated annual number of responses per respondent: 3.5.

Estimated annual number of responses: 21.

Estimated total annual burden on respondents: 17 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 6th day of December 2012.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2012–29884 Filed 12–10–12; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–428–840]

Lightweight Thermal Paper From Germany; Preliminary Results of Antidumping Duty Administrative Review; 2010–2011

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on lightweight thermal paper (LWTP) from Germany for the period November 1, 2010, through October 31, 2011. We have preliminarily determined that Papierfabrik August Koehler AG (Koehler) made sales of subject merchandise at less than normal value, based on adverse facts available (AFA).

DATES: *Effective Date:* December 11, 2012.

FOR FURTHER INFORMATION CONTACT: Stephanie Moore or George McMahon, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–3692 or (202) 482–1167, respectively.

SUPPLEMENTARY INFORMATION:

Scope of the Order

The merchandise covered by the order is lightweight thermal paper. The merchandise subject to the order is currently classified under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 3703.10.60, 4811.59.20, 4811.90.8000, 4811.90.8030, 4811.90.8040, 4811.90.8050, 4811.90.9000, 4811.90.9030, 4811.90.9035, 4811.90.9050, 4811.90.9080, 4811.90.9090, 4820.10.20, and 4823.40.00. Although the HTSUS numbers are provided for convenience and customs purposes, the written product description, available in the *Orders,* remains dispositive.[1]

Methodology

In making these findings, we have relied on total facts available and because Koehler did not act to the best of its ability to respond to the Department's requests for information, we have drawn an adverse inference in selecting from among the facts otherwise available. *See* sections 776(a) and (b) of the Tariff Act of 1930, as amended (the Act).

Pursuant to section 776(b) of the Act, we are relying on information from the petition in order to ensure that the AFA rate is sufficiently adverse so as to induce cooperation.[2] Accordingly, we have preliminarily determined to apply a 75.36 percent rate as AFA for Koehler. For a full description of the methodology underlying our conclusions, *see* the Memorandum to Paul Piquado, Assistant Secretary for Import Administration from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, titled ''Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Lightweight Thermal Paper from Germany,'' (Preliminary Decision Memorandum), dated concurrently with these results and hereby adopted by this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). IA ACCESS is available to registered users at *http://iaaccess.trade.gov* and in the Central Records Unit (CRU), room 7046 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly on the Internet at *http://www.trade.gov/ia/*. The signed Preliminary Decision Memorandum and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Preliminary Results of the Review

As a result of this review, we preliminarily determine that the following weighted-average dumping margin exists for the period November 1, 2010, through October 31, 2011:

Manufacturer/exporter	Weighted-average dumping margin (percent)
Papierfabrik August Koehler AG	75.36

Disclosure and Public Comment

Pursuant to 19 CFR 351.309(c), interested parties may submit cases briefs not later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[3] Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) A statement of the issue, (2) a brief summary of the argument, and (3) a table of authorities.[4]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, filed electronically via IA ACCESS within 30 days after the date of publication of this notice.[5] Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. The Department will issue the final results of this administrative review, including the results of its analysis of the issues raised by the parties in any written briefs, not later 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rate

Upon issuance of the final results, the Department shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review. For Koehler, we will assign an importer-specific *ad valorem* duty assessment rate to the total entered value of those same sales in accordance with section 776(b) of the Act.[6] We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review when the importer-specific assessment rate in the final results of this review is above *de minimis* (*i.e.,* 0.50 percent). Where either the respondent's weighted-average dumping margin is zero or *de minimis,* or an importer-specific

[1] *See Antidumping Duty Orders: Lightweight Thermal Paper from Germany and the People's Republic of China,* 73 FR 70959 (November 24, 2008) (*Orders*).

[2] *See* Memorandum to File through Eric B. Greynolds, Program Manager, AD/CVD Operations 3, from the Team, titled ''Lightweight Thermal Paper from Germany: Notice of Preliminary Results of Antidumping Administrative Review: Application of Total Adverse Facts Available Rate,'' (AFA Memo) dated concurrently with this notice.

[3] *See* 19 CFR 351.309(d).

[4] *See* 19 CFR 351.309(c)(2) and (d)(2).

[5] *See* 19 CFR 351.310(c).

[6] *See* 19 CFR 351.308.

assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review where applicable.

The Department clarified its ''automatic assessment'' regulation on May 6, 2003.[7] This clarification will apply to entries of subject merchandise during the period of review produced by each respondent for which they did not know that their merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company or companies involved in the transaction. For a full discussion of this clarification, *see Antidumping and Countervailing Duty Proceedings:*

Assessment of Antidumping Duties

We intend to issue instructions to CBP 15 days after publication of the final results of this review.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the notice of final results of administrative review for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication of the final results of this administrative review, as provided by section 751(a)(2) of the Act: (1) The cash deposit rate for Koehler listed in the ''Preliminary Result of the Review'' section, will be the rate established in the final results of this administrative review; (2) for merchandise exported by manufacturers or exporters not covered in this administrative review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 6.50 percent, the all-others rate established in the investigation.[8] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213.

Dated: December 3, 2012.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix I

List of Topics Discussed in the Preliminary Decision Memorandum

1. Background
2. Scope of the Order
3. Discussion of the Methodology
4. Corroboration of Secondary Information

[FR Doc. 2012–29891 Filed 12–10–12; 8:45 am]

BILLING CODE 3510–DS–P

[7] *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[8] *See Orders.*

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–849]

Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China: Final Results of Antidumping Administrative Review; 2010–2011

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On August 9, 2012, the Department of Commerce (the ''Department'') published the preliminary results of the administrative review (''AR'') of certain cut-to-length carbon steel plate (''CTL plate'') from the People's Republic of China (''PRC'') covering the period of review (''POR'') November 1, 2010 through October 31, 2011.[1] After analyzing the comments submitted by Nucor Corporation (''Petitioner'') with respect to the AR, the Department continues to find that Baosteel and Hunan Valin did not have shipments during the POR and that shipments by Anshan and Liaoning should be liquidated at the PRC-wide rate of 128.59 percent.

DATES: *Effective Date:* December 11, 2012.

FOR FURTHER INFORMATION CONTACT: Patrick O'Connor, AD/CVD Operations, Office 4, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–0989.

SUPPLEMENTARY INFORMATION:

Background

On August 9, 2012, the Department published its *Preliminary Results* of the AR of the antidumping order on CTL plate from the PRC covering the period November 1, 2010, through October 31, 2011. On September 10, 2012, Nucor Corporation (''Petitioners'') commented on the Department's *Preliminary Results.* No other parties commented on the *Preliminary Results.*

Analysis of the Comments Received

All issues raised in Petitioner's case brief in this AR are addressed in the memorandum from Gary Taverman, Senior Advisor for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Import Administration, ''Issues and Decision Memorandum for the Final Results of the Antidumping Administrative Review and Final Determination of No Shipments—Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China'' (''I&D Memorandum''), which is dated concurrently with this notice and which is hereby adopted by this notice. A list of the issues addressed in the I&D Memorandum is appended to this notice. The I&D Memorandum is a public document and is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Services System (''IA ACCESS). Access to IA ACCESS is available to registered users at *http://iaaccess.trade.gov* and in the Central Records Unit of the main Commerce Building, Room 7046. In addition, a complete version of the I&D Memorandum is accessible on the

[1] *See Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China: Preliminary Results of Antidumping Administrative Review and Preliminary Determination of No Shipments,* 77 FR 47593 (August 9, 2012) (''*Preliminary Results''*). The companies included in the review are as follows: Bao/Baoshan International Trade Corp./Bao Steel Metals Trading Corp. (''Baosteel''), Hunan Valin Xiangtan Iron & Steel Co., Ltd. (''Hunan Valin''), Anshan Iron & Steel Group (''Anshan''), and China Metallurgical Import and Export Liaoning Company (''Liaoning'').

Department's Web site at *http://www.trade.gov/ia/*. The signed I&D Memorandum and electronic versions of the I&D Memorandum are identical in content.

Changes Since the Preliminary Results

We have made no changes from the *Preliminary Results.*

Scope of the Order

The product covered by the order is certain CTL plate from the People's Republic of China, subject to certain exceptions. Imports of subject merchandise are classified under the Harmonized Tariff Schedule of the United States (''HTSUS'') under subheadings: 7208.40.3030, 7208.40.3060, 7208.51.0030, 7208.51.0045, 7208.51.0060, 7208.52.0000, 7208.53.0000, 7208.90.0000, 7210.70.3000, 7212.40.5000, 7212.50.0000. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the order is dispositive.[2]

Final Determination of No Shipments

As noted in the *Preliminary Results,* the Department determined that Baosteel and Hunan Valin did not have any reviewable transactions during the POR.[3] While Petitioner commented in its case brief on the possibility that Baosteel or Hunan Valin could have had sales of subject merchandise during the POR, as stated in the I&D Memorandum at Comment 3, we continue to find that neither party had shipments during the POR. Therefore, we will issue instructions to U.S. Customs and Border Protection (''CBP'') for both companies in the manner stated below.

Assessment

Upon issuance of the final results, the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review. The Department intends to issue assessment instructions to CBP 15 days after the publication date of the final results of this review. The Department intends to instruct CBP to liquidate entries of subject merchandise from Anshan and Liaoning at the PRC-wide rate of 128.59 percent. Additionally, pursuant to a recently announced refinement to its assessment practice in nonmarket economy cases, because the Department continues to determine that Baosteel and Hunan Valin had no shipments of the subject merchandise, any suspended entries that entered under these exporters' case numbers (*i.e.,* at that exporter's rate) will be liquidated at the PRC-wide rate. For a full discussion of this practice, *see Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011).

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this AR for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Tariff Act of 1930, as amended (''the Act''): (1) For Baosteel and Hunan Valin, which claimed no shipments, the cash deposit rate will remain unchanged from the rate assigned to these companies in the most recently completed review of the companies; (2) for previously investigated or reviewed PRC and non-PRC exporters who are not under review in this segment of the proceeding but who have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (3) for all PRC exporters of subject merchandise that have not been found to be entitled to a separate rate, including Anshan and Liaoning, the cash deposit rate will be the PRC-wide rate of 128.59 percent; and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter(s) that supplied that non-PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective order (''APO'') of their responsibility concerning the return or destruction of proprietary information disclosed under the APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

This notice of the final results of the administrative review is issued and published in accordance with sections 751(a)(1) and 777(i) of the Act and 19 CFR 351.213(d)(4).

Dated: December 3, 2012.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix

Issue 1: Whether Anshan and Lioaning Should be Treated as Part of the PRC-wide Entity

Issue 2: Whether Hunan Valin Should be Treated as Part of the PRC-wide Entity

Issue 3: Whether the Department Should Continue to Review Baosteel's and Hunan Valin's POR Shipments

[FR Doc. 2012–29887 Filed 12–10–12; 8:45 am]

BILLING CODE 3510–DS–P

[2] For a full description of the scope of the order, *see Suspension Agreement on Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China; Termination of Suspension Agreement and Notice of Antidumping Duty Order,* 68 FR 60081 (October 21, 2003).

[3] *See Preliminary Results,* 77 FR at 47594.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–805]

Certain Circular Welded Non-Alloy Steel Pipe From Mexico: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review; 2010–11

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to requests by interested parties, the Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on certain circular welded non-alloy steel pipe from Mexico. This administrative review covers mandatory respondents Pytco, S.A. de C.V. (PYTCO), Conduit S.A. de C.V. (Conduit); Mueller Comercial de Mexico, S. de R.L. de C.V. (Mueller); Lamina y Placa Comercial, S.A. de C.V. (Lamina y Placa); and Tuberia Nacional, S.A. de C.V. (TUNA). We preliminarily determine that the respondents did not have reviewable sales, shipments, or entries during the POR. Interested parties are invited to comment on these preliminary results.

DATES: *Effective Date:* December 11, 2012.

FOR FURTHER INFORMATION CONTACT: Mark Flessner or Robert James, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–6312 or (202) 482–0469, respectively.

SUPPLEMENTARY INFORMATION:

Period of Review

The period of review (POR) is November 1, 2010, through October 31, 2011.

Scope of the Order

The products covered by the order are circular welded non-alloy steel pipes and tubes, of circular cross-section, not more than 406.4 millimeters (16 inches) in outside diameter, regardless of wall thickness, surface finish (black, galvanized, or painted), or end finish (plain end, beveled end, threaded, or threaded and coupled). The merchandise covered by the order and subject to this review is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings: 7306.30.10.00, 7306.30.50.25, 7306.30.50.32, 7306.30.50.40, 7306.30.50.55, 7306.30.50.85, and 7306.30.50.90. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive. For the complete scope, *see Antidumping Duty Order.*[1]

Partial Rescission of Administrative Review

Timely requests for administrative review of ten companies were received from parties. For a full description of requests for review and the methodology underlying our conclusions, *see* the Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Import Administration, ''Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Certain Circular Welded Non-Alloy Steel Pipe from Mexico,'' (Preliminary Decision Memorandum), dated concurrently with this notice, which is hereby adopted by this notice. Petitioner Allied Tube and Conduit (Allied) requested administrative reviews of the following companies: Conduit; Mueller; PYTCO; Lamina y Placa; and TUNA. Petitioner Wheatland Tube Company (Wheatland) requested administrative reviews of the following companies: Galvak, S.A. de C.V. (Galvak); Hylsa, S.A. de C.V. (Hylsa); Industrias Monterrey S.A. de C.V. (IMSA); Mueller; Southland Pipe Nipples Co., Inc. (Southland); Lamina y Placa; Ternium Mexico, S.A. de C.V. (Ternium); and TUNA. Petitioner U.S. Steel Corporation (U.S. Steel) requested administrative reviews of the following companies: Conduit; Mueller; Southland; Lamina y Placa; Ternium; and TUNA. On March 29, 2012, Wheatland timely withdrew its requests for administrative review with regard to all companies for whom it had requested an administrative review. Also on March 29, 2012, U.S. Steel timely withdrew its requests for administrative review with regard to all companies for whom it had requested an administrative review. The remaining companies for whom administrative reviews had been requested were TUNA, Lamina y Placa, Mueller, PYTCO, and Conduit. Therefore, in accordance with 19 CFR 351.213(d)(1), we preliminarily rescind the administrative review with respect to the companies named in the *Initiation Notice* [2] for which no request for administrative review remains on the record of this proceeding, to wit: Ternium, Galvak, Hylsa, IMSA, and Southland.

Preliminary Determination of No Shipments

A. No Shipments Claims

PYTCO

PYTCO submitted a letter to the Department indicating that it made no shipments or entries of subject merchandise to the United States during the POR that are subject to this administrative review. In response to the Department's query, CBP data showed that a single entry of subject merchandise may have entered for consumption into the United States during the POR.[3] In its claim of no shipments, PYTCO did not address the status of this single entry. Through multiple questionnaire responses, PYTCO provided additional documentation which demonstrated that the single entry in question had (a) been mischaracterized as subject merchandise and (b) did not involve an actual sale. We received no information from CBP to contradict the results of our data query and the claims made by this respondent. In addition, despite close questioning on the subject of sales by its POR affiliates, no evidence of sales by PYTCO's affiliates was established on the record of this proceeding. Therefore, because the evidence on the record indicates that PYTCO (and its affiliates) made no shipments of subject merchandise to the United States during the POR, we preliminarily determine that there are no reviewable transactions during the POR for PYTCO. For further discussion, *see* the Preliminary Decision Memorandum.

Since the implementation of the 1997 regulations, our practice concerning no shipment respondents had been to rescind the administrative review if the respondent certifies that it had no shipments and we have confirmed through our examination of CBP data that there were no shipments of subject merchandise during the POR.[4] In such circumstances, we normally instructed CBP to liquidate any entries from the no shipment company at the deposit rate in effect on the date of entry.

In our May 6, 2003, ''automatic assessment'' clarification, we explained that, where respondents in an administrative review demonstrate that they had no knowledge of sales through resellers to the United States, we would instruct CBP to liquidate such entries at the all-others rate applicable to the proceeding.[5]

Because ''as entered'' liquidation instructions do not alleviate the concerns which the *Assessment Policy Notice* was intended to address, we find it appropriate in this case to instruct CBP to liquidate any existing entries of merchandise produced by the respondents, and exported by other parties at the all-others rate, should we continue to find that the respondents had no shipments of subject merchandise in the POR in our final

[1] *See Notice of Antidumping Duty Orders: Certain Circular Welded Non-Alloy Steel Pipe from Brazil, the Republic of Korea (Korea), Mexico, and Venezuela and Amendment to Final Determination of Sales at Less Than Fair Value: Certain Welded Non-Alloy Steel Pipe from Korea,* 57 FR 49453 (November 2, 1992) (*Antidumping Duty Order*).

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 76 FR 82268 (December 30, 2011) (*Initiation Notice*).

[3] *See* Memorandum from Mark Flessner to the File entitled, ''Certain Circular Welded Non-Alloy Steel Pipe from Mexico: Placement on the Record of U.S. Customs and Border Patrol Information for 2010–2011 Period of Review,'' dated January 27, 2012, at Attachment 1.

[4] *See Antidumping Duties; Countervailing Duties,* 62 FR 27296, 27393 (May 19, 1997); *see also Oil Country Tubular Goods from Japan: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission of Review,* 70 FR 53161, 53162 (September 5, 2007), unchanged in *Oil Country Tubular Goods from Japan: Final Results and Partial Rescission of Antidumping Duty Administrative Review,* 71 FR 95 (January 3, 2006).

[5] *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003) (*Assessment Policy Notice*).

results.[6] In addition, the Department finds that it is more consistent with the *Assessment Policy Notice* not to rescind the review in its entirety but, rather, to complete the review with respect to the respondents, issuing appropriate instructions to CBP based on the final results of the review. *See* the ''Assessment Rates'' section of this notice below.

B. Duty Absorption

On January 30, 2012, Wheatland requested that the Department conduct a duty absorption inquiry with regard to each of the companies for whom an administrative review had been requested. *See* the Preliminary Decision Memorandum. Because this review was not initiated at the two-year or four-year interval from publication of the antidumping duty order, a duty absorption inquiry is not authorized. *See Antidumping Duty Order.*

Disclosure and Public Comment

Pursuant to 19 CFR 351.309(c), interested parties may submit cases briefs not later than the later of 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[7] Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[8] Case and rebuttal briefs should be filed using Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS).[9]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, filed electronically via IA ACCESS. An electronically filed document must be received successfully in its entirety by the Department's electronic records system, IA ACCESS, by 5 p.m. Eastern Standard Time within 30 days after the date of publication of this notice.[10] Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. The Department will issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon completion of the administrative review, the Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries, in accordance with 19 CFR 351.212. The Department intends to issue appraisement instructions directly to CBP 15 days after the date of publication of the final results of this review.

As noted above, the Department clarified its ''automatic assessment'' regulation on May 6, 2003. *See* the *Assessment Policy Notice.* This clarification will apply to POR entries by each respondent company if we continue to make a final determination of no shipments based upon their certifications that they made no POR shipments of subject merchandise for which they had knowledge of U.S. destination. We will instruct CBP to liquidate these entries at the all-others rate established in the less-than-fair-value investigation (32.62 percent) [11] if there is no rate for the intermediary involved in the transaction. *See* the *Assessment Policy Notice* for a full discussion of this clarification.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

The preliminary results of administrative review and this notice are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended.

Dated: November 29, 2012.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix I

List of Topics Discussed in the Preliminary Decision Memorandum

No Shipments Claim—PYTCO
Duty Absorption

[FR Doc. 2012–29646 Filed 12–10–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–840]

Final Results of Antidumping Duty Changed Circumstances Review: Certain Frozen Warmwater Shrimp From India

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On October 24, 2012, the Department of Commerce (the Department) published a notice of preliminary results of changed circumstances review of the antidumping duty order on certain frozen warmwater shrimp (shrimp) from India.[1] In that notice, we preliminarily determined that Apex Frozen Foods Private Limited (Apex Frozen) is the successor-in-interest to Apex Exports (Apex) for purposes of determining antidumping duty cash deposits and liabilities. No interested party submitted comments on, or requested a public hearing to discuss, the *Initiation and Preliminary Results.* Therefore, for these final results, the Department continues to find that Apex Frozen is the successor-in-interest to Apex.

DATES: *Effective Date:* December 11, 2012.

FOR FURTHER INFORMATION CONTACT: Elizabeth Eastwood or David Crespo, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW, Washington, DC 20230; telephone (202) 482–3874 or (202) 482–3693, respectively.

SUPPLEMENTARY INFORMATION:

Background

On September 6, 2012, Apex Frozen requested that the Department conduct

[6] *See, e.g., Magnesium Metal From the Russian Federation: Preliminary Results of Antidumping Duty Administrative Review,* 75 FR 26922, 26923 (May 13, 2010), unchanged in *Magnesium Metal From the Russian Federation: Final Results of Antidumping Duty Administrative Review,* 75 FR 56989, 56990 (September 17, 2010).

[7] *See* 19 CFR 351.309(d).

[8] *See* 19 CFR 351.309(c)(2) and (d)(2).

[9] *See* 19 CFR 351.303.

[10] *See* 19 CFR 351.310(c).

[11] *See Final Determination of Sales at Less Than Fair Value: Circular Welded Non-Alloy Steel Pipe From Mexico,* 57 FR 42953 (September 17, 1992).

[1] *See Notice of Initiation and Preliminary Results of Antidumping Duty Changed Circumstances Review: Certain Frozen Warmwater Shrimp From India,* 77 FR 64953 (Oct. 24, 2012) (*Initiation and Preliminary Results*).

an expedited changed circumstances review under 19 CFR 351.221(c)(3)(ii) to confirm that it is the successor-in-interest to Apex for purposes of determining antidumping duty cash deposits and liabilities.

On October 24, 2012, the Department preliminarily determined that Apex Frozen is the successor-in-interest to Apex. *See Initiation and Preliminary Results,* 77 FR at 64955. In the *Initiation and Preliminary Results,* we provided all interested parties with an opportunity to comment or request a public hearing regarding this finding. We received no comments or requests for a public hearing from interested parties within the time period set forth in the *Initiation and Preliminary Results.*

Scope of the Order

The scope of this order includes certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,[2] deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of this order, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTSUS), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn *(Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp *(Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of this order. In addition, food preparations, which are not ''prepared meals,'' that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of this order.

Excluded from the scope are: (1) Breaded shrimp and prawns (HTSUS subheading 1605.20.10.20); (2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell-on or peeled (HTSUS subheadings 0306.23.00.20 and 0306.23.00.40); (4) shrimp and prawns in prepared meals (HTSUS subheading 1605.20.05.10); (5) dried shrimp and prawns; (6) canned warmwater shrimp and prawns (HTSUS subheading 1605.20.10.40); (7) certain battered shrimp. Battered shrimp is a shrimp-based product: (1) That is produced from fresh (or thawed-from-frozen) and peeled shrimp; (2) to which a ''dusting'' layer of rice or wheat flour of at least 95 percent purity has been applied; (3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; (4) with the non-shrimp content of the end product constituting between four and ten percent of the product's total weight after being dusted, but prior to being frozen; and (5) that is subjected to IQF freezing immediately after application of the dusting layer. When dusted in accordance with the definition of dusting above, the battered shrimp product is also coated with a wet viscous layer containing egg and/or milk, and par-fried.

The products covered by this order are currently classified under the following HTSUS subheadings: 0306.17.00.03, 0306.17.00.06, 0306.17.00.09, 0306.17.00.12, 0306.17.00.15, 0306.17.00.18, 0306.17.00.21, 0306.17.00.24, 0306.17.00.27, 0306.17.00.40, 1605.21.10.30, and 1605.29.10.10. These HTSUS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of this order is dispositive.

Final Results of Changed Circumstances Review

For the reasons stated in the *Initiation and Preliminary Results,* and because we received no comments from interested parties to the contrary, the Department continues to find that Apex Frozen is the successor-in-interest to Apex. As a result of this determination, we find that Apex Frozen should receive the cash deposit rate previously assigned to Apex in the most recently completed review of the antidumping duty order on shrimp from India.[3] Consequently, the Department will instruct U.S. Customs and Border Protection to suspend liquidation of all shipments of subject merchandise produced and/or exported by Apex Frozen and entered, or withdrawn from warehouse, for consumption on or after the publication date of this notice in the **Federal Register** at 2.51 percent, which is the current cash deposit rate for Apex.[4] This cash deposit requirement shall remain in effect until further notice.

We are issuing this determination and publishing these final results and notice in accordance with sections 751(b)(1) and 777(i)(1) and (2) of the Tariff Act of 1930, as amended, and 19 CFR 351.216 and 351.221(c)(3).

Dated: December 5, 2012.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2012–29885 Filed 12–10–12; 8:45 am]

BILLING CODE 3510–DS–P

[2] ''Tails'' in this context means the tail fan, which includes the telson and the uropods.

[3] *See Certain Frozen Warmwater Shrimp From India: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination,* 77 FR 40848, 40850 (July 11, 2012).

[4] *See, e.g., Certain Frozen Warmwater Shrimp From India: Final Results of Antidumping Duty Changed Circumstances Review,* 75 FR 52718, 52719 (Aug. 27, 2010).

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions; Clarification

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Notice.

SUMMARY: The Committee for Purchase From People Who Are Blind or Severely Disabled (Committee) is providing supplementary information to its Notice in the **Federal Register** of October 26, 2012.

FOR FURTHER INFORMATION CONTACT: Barry S. Lineback, Director, Business Operations, 1421 Jefferson Davis Highway, Jefferson Plaza II, Suite 10800, Arlington, VA, Telephone: (703) 603–2118; FAX 703–603–0655 or email *CMTEFedReg@abilityone.gov*

SUPPLEMENTARY INFORMATION: The Committee's Notice in the **Federal Register** of Friday, October 26, 2012 (77 FR 65365–65366), concerning additions to the Procurement List, specified ''Eyewear'' with coverage for 100% of the requirements for Veterans Integrated

Service Networks (VISNs) 1, 3, 4, 5, 6, 7, and 8, as aggregated by Service Area Office (SAO) East, Veterans Health Administration, Department of Veterans Affairs, Pittsburgh, PA, with an effective date of November 26, 2012. This Notice is to clarify that the Committee's decision to add the referenced eyewear requirement to the Procurement List does not affect current contracts or option years exercised under those contracts. Nor does the Committee's decision preclude the Department of Veterans Affairs from implementing its Veterans First Program in awarding prime contracts for optical products and services in accordance with their published procedures.

Further, the Committee is temporarily suspending the November 26, 2012 effective date for the following locations: VISNs 1, 3, 4, 5, 6 and those portions of VISN 8 that have existing commercial contracts as of November 26, 2012. Concurrently, pursuant to 41 CFR 51–2.4, the Committee will reconsider the decision in order to determine whether it had all appropriate information for consideration when the Committee extended to SAO East its decision that the products were suitable for procurement by the Government.

Interested parties may submit comments pertaining to the eyewear addition for the Committee's consideration no later than 5 p.m. on January 28, 2013. Comments received after this date will not be considered. Comments should be submitted to Barry S. Lineback at the address above.

Dated: December 6, 2012.

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2012–29873 Filed 12–10–12; 8:45 am]

BILLING CODE 6353–01–P

CONSUMER PRODUCT SAFETY COMMISSION

[CPSC Docket No. 13–1]

Baby Matters, LLC; Complaint

AGENCY: Consumer Product Safety Commission

ACTION: Publication of a Complaint under the Consumer Product Safety Act.

SUMMARY: Under provisions of its Rules of Practice for Adjudicative Proceeding (16 CFR part 1025), the Consumer Product Safety Commission must publish in the **Federal Register** Complaints which it issues. Published below is a Complaint: In the Matter of Baby Matters, LLC.[1]

SUPPLEMENTARY INFORMATION: The text of the Complaint appears below.

Dated: December 5, 2012.

Todd A. Stevenson,

Secretary.

UNITED STATES OF AMERICA

CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of BABY MATTERS LLC, Respondent.

CPSC DOCKET NO. 13–1

Complaint

Nature of Proceedings

1. This is an administrative enforcement proceeding pursuant to Section 15 of the Consumer Product Safety Act (''CPSA''), as amended, 15 U.S.C. 2064, and Section 15 of the Federal Hazardous Substances Act (''FHSA''), as amended, 15 U.S.C. 1274, for public notification and remedial action to protect children from the substantial risks of injury and death presented by infant recliners known as the Nap Nanny® and the Nap Nanny® Chill™ (collectively, the ''Subject Products''), imported, distributed and sold by Baby Matters LLC (''Baby Matters'' or ''Respondent'').

2. This proceeding is governed by the Rules of Practice for Adjudicative Proceedings before the Consumer Product Safety Commission (the ''Commission''), 16 CFR part 1025.

Jurisdiction

3. This proceeding is instituted pursuant to the authority contained in Sections 15(c), (d) and (f) of the CPSA, 15 U.S.C 2064 (c), (d) and (f), and Sections 15(c), (d) and (e) of the FHSA, 15 U.S.C. 1274(c), (d) and (e).

Parties

4. Complaint Counsel is the staff of the Division of Compliance within the Office of the General Counsel of the Commission (''Complaint Counsel''). The Commission is an independent federal regulatory agency established pursuant to Section 4 of the CPSA, 15 U.S.C. 2053.

5. Respondent is a Pennsylvania limited liability company with its principal place of business located at 531 Winston Way, Berwyn, Pennsylvania, 19312.

6. From January 2009 until November 2012, Respondent was an importer, distributor, and retailer of the Subject Products, as those terms are defined in CPSA Sections 3(a)(5), (7), (8), (11) and (13) of the CPSA, 15 U.S.C. 2052(a)(5), (7), (8), (11) and (13).

7. As an importer, from January 2009 until November 2012 Respondent was a ''manufacturer'' as that term is defined in CPSA Section 3(a)(11), 15 U.S.C. 2052(a)(11).

The Consumer Product

8. From January 2009 until November 2012, Respondent imported and distributed the Subject Products in U.S. commerce and offered them for sale to consumers for their personal use in or around a permanent or temporary household or residence, in recreation or otherwise.

9. The Subject Products are sold under the brand names Nap Nanny® (''Nap Nanny''), and The Nap Nanny® Chill™'' (the ''Chill'').

10. Upon information and belief, three models of the Nap Nanny have been introduced in U.S. commerce.

11. Upon information and belief, one model of the Nap Nanny (''Generation One'') was sold between January 2009 and August 2009.

12. Upon information and belief, the Generation One consists of a shaped foam seat base covered by a removable fabric shell, and is equipped with a three-point harness.

13. Upon information and belief, the harness on each Generation One Product is attached to the fabric cover only and is not secured to the foam base underneath.

14. Upon information and belief, a second model of the Nap Nanny (''Generation Two'') was sold between August 2009 and as late as April 2012.

15. Upon information and belief, the Generation Two consists of a shaped foam seat base covered by a removable fabric shell and is equipped with a three-point harness.

16. Upon information and belief, the contour of the foam seat base of the Generation Two is identical to that of the Generation One.

17. Upon information and belief, the harness system in the Generation Two is sewn to the fabric cover but also can be secured to two ''D''-shaped rings embedded in the foam base by means of Velcro™ tabs.

18. Upon information and belief, a third model of the Nap Nanny, the Chill, has been sold since January 2011.

19. Upon information and belief, the Chill consists of a shaped foam seat base covered by a removable fabric shell and is equipped with a three-point harness.

20. Upon information and belief, the contour of the Chill model's foam base

[1] Commissioner Nancy A. Nord issued a statement regarding this issue. The statement is available on the Commission Web site, *www.cpsc.gov* or from the Office of the Secretary.

has been modified from those of the Generation One and Generation Two versions of the Subject Products.

21. Upon information and belief, the contour of the Chill forms a more narrow space around the infant's hip area and provides a higher side wall on either side of the infant than do either the Generation One or Generation Two models of the Subject Products.

22. Upon information and belief, the harness in the Chill is permanently attached to the foam base, in contrast to the design of the Generation One and Generation Two Subject Products.

23. Upon information and belief, the foam core components of the Subject Products were, and continue to be, manufactured by G&T Industries, of Reading, Pennsylvania.

24. Upon information and belief, the fabric covers of the Generation One and a portion of fabric covers of the Generation Two were manufactured by Ricochet Manufacturing, of Philadelphia, Pennsylvania.

25. Upon information and belief, the fabric covers for a portion of the Generation Two are manufactured by Jiaxing Jiayi Garment Co. Ltd., of Jiazing, Zhejiang, in China.

26. Upon information and belief, the fabric covers for the Chill are manufactured by Jiaxing Jiayi Garment Co. Ltd., of Jiazing, Zhejiang, in China.

27. Upon information and belief, Respondent imports these fabric covers into the United States.

28. Upon information and belief, the Subject Products have been, and continue to be, sold for a retail price of approximately $130.

29. Upon information and belief, approximately 5,000 units of the Generation One and 50,000 units of the Generation Two have been sold to consumers in the United States.

30. Upon information and belief, approximately 100,000 units of the Chill have been sold to consumers in the United States.

31. Upon information and belief, Respondent advised the public on its Web site in November 2012 that Respondent has ''closed [its] doors,'' and directed consumers to Respondent's retail partners that continued to sell the Chill.

32. Upon information and belief, subsequently, on or about November 27, 2011, Respondent removed the message that it had ''closed [its] doors'' and replaced it with links to the Chill's User Guide and registration. Respondent retained the message directing consumers to Respondent's retail partners that continued to sell the Chill.

Count 1

The Subject Products are Substantial Product Hazards Under Section 15(a)(2) of the CPSA, 15 U.S.C. 2064(a)(2), Because They Contain Product Defects That Create a Substantial Risk of Injury to the Public

The Subject Products Contain a Design Defect

33. Paragraphs 1 through 32 are hereby realleged and incorporated by reference as though fully set forth herein.

34. A product may contain a defect even if a product is manufactured in exact accordance with its design and specifications, if the design presents a risk of injury to the public. 16 CFR § 1115.4.

35. Upon information and belief, because the restraint system in the Generation One is designed such that the harness straps are secured only to the fabric cover and cannot be attached to the foam seat base, the fabric cover can move freely over the seat base so that there is no means of anchoring the harness to any fixed point.

36. Upon information and belief, this defective design allows the infant to have significant movement within the Generation One even when the harness is used.

37. Upon information and belief, the harness straps of the Generation One slide easily through the buckles when the infant user moves, preventing a secure, snug fit around the infant's waist.

38. Upon information and belief, this defective design allows freedom of movement such that the infant is able to maneuver over the side walls of the Generation One and into other compromised positions. This hazardous scenario exists even while the harness is in use.

39. Upon information and belief, the restraint system in the Generation Two is designed such that the two harness straps that encircle the infant's waist are sewn to the fabric cover but also could be secured, via Velcro™ tabs, to two ''D''-shaped rings embedded in the foam seat base. The third point of the harness is sewn to the fabric cover between the infant user's legs with no means of attaching it to a fixed point on the foam seat base, causing the harness straps to slide easily through the buckles and prevent a secure, snug fit around the infant's waist.

40. Upon information and belief, when the harness is not attached to the ''D''-shaped rings, the Generation Two harness moves freely with the fabric cover.

41. Upon information and belief, this defective design allows an infant to fall or hang over the side of a Generation Two even while the harness is in use, which can result in injury or death.

42. Upon information and belief, parents and caregivers who remove the fabric cover of the Generation Two are directed in Respondent's instructions that failure to secure the harness around the ''D'' shaped rings can allow the infant to turn and contact the floor.

43. Upon information and belief, the Velcro™ tabs in the Generation Two loosen as the infant user moves in the seat.

44. Upon information and belief, over time, due to the nature of Velcro™, the tabs gradually detach with ease, thereby rendering the restraint system ineffective, posing a risk of injury and death to the infant.

45. Upon information and belief, parents or other caregivers using a Generation Two are not likely to immediately know that the Velcro™ tabs have detached from the ''D''-shaped ring.

46. Upon information and belief, parents or other caregivers, may be unaware of the importance of ensuring that the Velcro™ tabs are secured around the ''D''-shaped rings after replacing the cover and before every use.

47. Upon information and belief, because the restraint system in the Chill is permanently attached to three points on the foam seat base, this design makes it difficult for caregivers to adjust the waist straps.

48. Upon information and belief, because it is difficult to adjust the waist straps in the Chill, parents and other caregivers are less likely to use the harness.

49. Upon information and belief, due to difficulty of use in the case of the Chill and ineffectiveness in the case of the other models, parents and other caregivers are unlikely to use the harness on any of the Subject Products.

50. Upon information and belief, even if the harness is used, the harness may fail to prevent the infant user from moving into a compromised position if it is not adequately tightened around the infant.

51. These defective designs pose a risk of injury and death to infant users.

The Subject Products Are Defective Because the Risk of Injury Occurs as a Result of Their Operation or Use

52. A design defect may also be present if the risk of injury occurs as a result of the operation or use of the product. 16 CFR § 1115.4.

53. Upon information and belief, the Subject Products have been advertised and marketed by Respondent as devices that promote a full night's sleep for infants.

54. Upon information and belief, the risk of injury occurs as a result of the use of the Subject Products by parents and caregivers who, contrary to the on-product warnings, are likely to use the product, regardless of the version, in cribs and other traditional sleep environments in order to ensure the child's safety during a full night's sleep.

55. Upon information and belief, the risk of injury occurs as a result of the foreseeable use and/or misuse of the Subject Products by parents and caregivers.

56. Upon information and belief, infants who are not adequately restrained in the Subject Products may move into compromised positions on the side or inside the seat well of the recliner, which can result in injury or death.

57. Upon information and belief, when a Subject Product is used in a crib, an infant may be able to maneuver its head over the side of the Subject Product and become entrapped between the Subject Product and a bumper pad of a crib or the side of a crib, which can result in injury or death.

58. The Subject Products contain a design defect because they fail to operate as intended and present a substantial risk of injury to the public.

The Subject Products Are Defective Because Their Instructions and Warnings Are Inadequate

59. A defect can occur in a product's contents, construction, finish, packaging, warnings and/or instructions. 16 CFR § 1115.4.

60. A defect can occur when reasonably foreseeable consumer use or misuse, based in part on the lack of adequate instructions and safety warnings, could result in injury, even where there are no reports of injury. 16 CFR § 1115.4.

61. Upon information and belief, from approximately January 2009 through July 2010, all of the Generation One and Generation Two models had a warning label that read as follows: ''Safety guidelines to prevent injury or death: FALL HAZARD: ALWAYS use on the floor. This product should not be used inside a crib. NEVER place product on countertops, tables, steps or other elevated surfaces. SUFFOCATION HAZARD: NEVER use on soft or uneven surface (sofa, bed cushion), as seat may tip over and cause suffocation. NEVER use with blankets, towels, pillows, or other soft objects while child is in seat. Intended for infants 8 pounds or 3.6 kilograms and above. NEVER leave child in the seat when straps are loose or undone. Adjust the straps provided so they fit snugly around the infant. NEVER move or carry unit while child is in seat. Not intended for carrying a baby.''

62. Upon information and belief, this warning was printed in extremely small (approximately 6-point) font on the underside of the product, which would be placed on the floor or other surface and thus not visible to consumers during use.

63. Upon information and belief, on or about April 17, 2010, a six-month-old girl died when she suffocated while using a Generation Two model of the Subject Products. Not secured in the harness, the infant was found with her face pressed between the Nap Nanny and the crib bumper. The medical examiner ruled the cause of death as probable positional asphyxia.

64. Upon information and belief, on or about July 9, 2010, a four-month-old girl died when she suffocated between a Generation Two Nap Nanny and the bumper in her crib. Although the harness had been secured around the infant, it failed to adequately restrain her in the seat. She was found by her mother in the Nap Nanny, with the harness secured but with her head tilted back and her neck hyperextended. Her face was pressed against the bumper pad of her crib. The medical examiner ruled the cause of death as position/compression asphyxia.

65. On July 26, 2010, the Commission and the Respondent issued a joint press release announcing a recall of the Generation One and the Generation Two models of the Subject Products: *Baby Matters Recalls Nap Nanny® Recliners Due to Entrapment, Suffocation and Fall Hazards; One Infant Death Reported.*

66. Upon information and belief, on or about July 26, 2010, Respondent executed a corrective action plan in cooperation with the U.S. Consumer Product Safety Commission. As part of this corrective action plan, Respondent modified the warnings, instructions, and labeling on the Generation Two products that were in Respondent's inventory at the time and on the Subject Products imported, sold, and distributed thereafter by Respondent.

67. Upon information and belief, as part of the corrective action, Respondent relocated the warning label from the underside of the Generation Two model to the front of the Generation Two model, increased the font size of the warning, and changed the text of the warning label to read as follows: ''ALWAYS use on floor. NEVER use in crib. ALWAYS secure buckles on harness. NEVER use with infant under 8 pounds (3.6 kilograms). When infant can sit up, do not use for sleep. Suffocation hazards:—Do not place inside crib, other contained areas, or on the floor next to other vertical surfaces (e.g., walls, dresser). An infant who leans over side can become entrapped between the product and another object.—Never use on soft surfaces (e.g., bed, sofa, cushion) where product can tip over and cause suffocation in soft surfaces.—Do not add blankets, towels, or other soft objects that can cover face. Fall hazards:—Never use on counter tops, tables or other elevated surfaces from which infant can fall.—Never carry product with infant in it.—ALWAYS secure infant snugly in harness or infant may turn sideways and fall. Strangulation hazards:—Head/neck can get caught in loosely fastened seatbelt if infant tries to get out of product.—Head/neck can get caught in a fastened seatbelt not in use if active infant tries to climb in and out of product unassisted.''

68. Upon information and belief, the change in warning did not address the Subject Products that had already been purchased by consumers or that remained in retailers' inventory.

69. Upon information and belief, for products already purchased by consumers or those that remained in retailers' inventory, Respondent directed retailers with Generation Two products to place a sticker on the plastic bag covering the product.

70. Upon information and belief, the sticker directed users to a website, *www.napnanny.com/recall,* which contained the revised warnings and instructions that were part of the recall and corrective action plan.

71. Upon information and belief, at the time of the recall, Respondent knew of the July 9, 2010 fatality, one injury, and 21 other incidents resulting from the failure of the harness systems on the Generation One and the Generation Two to properly secure the infant.

72. Upon information and belief, since the Chill was first introduced into commerce in January 2011, the warning label read as follows: ''To avoid serious injury or death, read and follow the warnings and instructions provided below: ALWAYS use on floor. NEVER use in crib. ALWAYS secure buckles on harness. NEVER use with clothing or blankets that interfere with the use of the harness. Harness must always be snug against your child. NEVER use with infant under 8 pounds (3.6 kilograms). When infant can sit up, do not use for sleep. For infants who

cannot sit up, use for sleep, feeding and play time. ALWAYS secure infant snugly in harness or infant may turn sideways and fall. Suffocation hazards—Do not place inside crib, other contained areas, or on the floor next to other vertical surfaces (e.g., walls, dresser). An infant who leans over side can become entrapped between the product and another object.—Never use on soft surface (e.g., bed, sofa, cushion) where product can tip over and cause suffocation in soft surfaces.—Do not add blankets, towels, or other soft objects that can cover face. Fall hazards—Never use on counter tops, tables, or other elevated surfaces from which infant can fall.—Never carry product with infant in it.—ALWAYS secure infant snugly in harness or infant may turn sideways and fall. Strangulation hazards—Head/neck can get caught in loosely fastened seatbelt if infant tries to get out of product.—Head/neck can get caught in a fastened seatbelt not in use if active infant tries to climb in and out of product unassisted.''

73. Upon information and belief, subsequent to the July 2010 recall, and despite enhanced warnings and revised instructions on the Subject Products, parents and caregivers continue to use the Subject Products inside of cribs and other sleeping environments, contrary to the warnings on the Subject Products.

74. Upon information and belief, subsequent to the July 2010 recall, and despite enhanced warnings and revised instructions on the Subject Products, parents and caregivers continue to use the Subject Products without using the harness or ensuring that the harness is firmly secured around the infant.

75. Upon information and belief, since the July 2010 recall, at least three additional fatalities of infants using the Subject Products have been reported.

76. Upon information and belief, one of those fatalities involved an infant sleeping in the Chill.

77. Upon information and belief, over 70 other incidents have been reported of children nearly falling out of the Subject Products.

78. The warnings and instructions on the Subject Products are inadequate and defective because they do not and cannot effectively communicate to parents and caregivers the hazard associated with use of the Subject Products inside cribs and other sleep enclosures.

79. The warnings and instructions on the Subject Products are inadequate and defective because they do not and cannot effectively communicate to parents and caregivers the hazard associated with the Subject Products if the harness is not used or is not snugly secured around the infant.

80. Because the warnings and instructions on the Subject Products are inadequate and defective, parents will continue to use the Subject Products in cribs or other enclosures.

81. Because the warnings and instructions on the Subject Products are inadequate and defective, parents will not use the harness provided or will not secure it snugly around the infant.

82. Parents and caregivers cannot and do not appreciate the hazard associated with using the Subject Products in locations other than the floor, and it is thus foreseeable that they will use the Subject Products in cribs, play yards, or other enclosures. These uses can and do result in infant death and injury.

83. Parents and caregivers cannot and do not appreciate the hazard associated with not using the harness or not securing the harness snugly, and it is foreseeable that they will use the Subject Products without securing the harness or without securing it snugly around the infant. These uses can and do result in infant death and injury.

84. The warnings on the Subject Products are inadequate and defective because while they warn against use of the Subject Products in a crib and advise users to secure the infant with the three point harness, they do not convey the gravity of the consequences of non-compliance. Specifically, the warnings and instructions do not communicate that an infant can die if placed in a Subject Product used in a crib or other enclosure, or if the harness is not used or adequately secured. These uses can and do result in infant injury and death.

85. In addition, the warnings and instructions on the Generation Two are inadequate and defective because they do not convey the importance of ensuring, before each use, that the Velcro™ tabs are attached to the ''D''-shaped rings embedded in the foam seat. The Velcro™ tabs can loosen with time and normal use of the Generation Two, allowing a child to extend his or her head over the side of the product or to fall down inside the well of the seat. It is not obvious to caregivers when these rings become loosened or unattached.

86. The effectiveness of the warnings on the Subject Products is further diminished by the advertising and marketing of the Subject Products.

87. Upon information and belief, in 2009 and thereafter, Respondent advertised the Subject Products as sleep products.

88. Upon information and belief, the advertisements encouraged consumers to use them for unattended, overnight sleep, advancing the tagline, ''Everybody Sleeps!''

89. Upon information and belief, Respondent's advertisements further encouraged consumers to use the Subject Products as a traditional sleep environment, contending that the product is, ''Better than a bassinet, more effective than a wedge.''

90. Upon information and belief, Respondent's advertisements also promoted the Subject Products as a safe environment for infant sleep, by characterizing the Subject Products as, ''The only portable infant recliner designed for sleep, play—and peace of mind.''

91. Upon information and belief, advertising for the Chill promotes the Chill as having ''a 3-point safety harness anchored to the foam—no D-rings or loose cover to worry about—a contoured bucket for maximum containment and a large foam base for total stability.''

92. Upon information and belief, that advertisement suggests that the Chill is safer than the Generation Two.

93. Upon information and belief, Respondent's retail partners advertised and marketed the Subject Products as a solution for babies with gastro-esophageal reflux disease that have difficulty sleeping comfortably on flat surfaces. Respondents knew or should have known that its retail partners advertised and marketed the Subject Products in this manner.

94. The advertising and marketing of the Subject Products conflict with the current warnings and instructions that the Subject Products should not be used for unattended overnight sleep.

95. The advertising and marketing of the Subject Products conflict with the current warnings and instructions that the Subject Products not be used if the infant can sit up unaided.

96. Because the advertising and marketing of the Subject Products conflict with the weight, age, and usage restrictions described on the label, the effectiveness of the warning label is diminished.

97. Even if the warnings and instructions on the Subject Products were enhanced, and the attendant advertising were changed, it is foreseeable that parents and caregivers would continue to use the products in cribs, bassinettes, and other sleep environments.

98. Parents and caregivers are likely to continue to use the Subject Products in enclosed spaces such as cribs in order to create a barrier to older siblings, pets, or pests in the home.

99. Parents and caregivers are likely to continue to use the Subject Products in

cribs because cribs are traditionally viewed as safe sleeping environments.

100. Because of the lack of adequate instructions and safety warnings, a substantial risk of death and injury occurs as a result of the foreseeable use and misuse of the Subject Products.

The Type of the Risk of Injury Renders the Subject Products Defective

101. The risk of injury associated with a product may render the product defective. 16 CFR § 1115.4.

102. The nature of the risk of injury includes death if a child becomes trapped between the side of the Subject Products and the bumper pad or the side of a crib.

103. The nature of the risk of injury also includes death if a child is not restrained in the seat of the Subject Products and suffocates on the interior wall or well of the seat.

104. Infants, a vulnerable population protected by the CPSA and FHSA, are exposed to risk of injury by the Subject Products.

105. The risk of injury associated with use of the Subject Products in a crib is neither obvious nor intuitive.

106. The risk of injury associated with use of the Subject Products without the harness or without tightly securing the harness is neither obvious nor intuitive.

107. Warnings and instructions cannot adequately mitigate the risk of injury and death associated with use of the Subject Products.

108. Because Respondent promoted the use of the Subject Products for unsupervised, overnight sleep, use of the Subject Products in a crib or other enclosed areas is foreseeable.

109. Use of the Subject Products without securing the harness around the infant is foreseeable.

110. The type of the risk of injury renders the Subject Products defective.

The Subject Products Create a Substantial Risk of Injury to the Public

111. The Subject Products pose a risk of injury or death to infants who may, consistent with developmentally appropriate behavior, maneuver to compromised positions either within Subject Products or partially outside Subject Products used in cribs.

112. Therefore, because the Subject Products are defective and create a substantial risk of injury, the Subject Products present a substantial product hazard within the meaning of Section 15(a)(2) of the CPSA, 15 U.S.C. 2064(a)(2).

Count 2

The Subject Products Are Intended for Use by Children and Contain Defects Which Create a Substantial Risk of Injury to Children Under Section 15(c)(1) of the FHSA

113. Paragraphs 1 through 112 are hereby realleged and incorporated by reference as though fully set forth herein.

114. Upon information and belief, the Subject Products are an article intended for use by children as young as newborns. Respondent has marketed, and continues to promote, the Subject Products as appropriate for use by infants weighing eight pounds or more until the infant can sit up unassisted.

115. The Subject Products contain a design defect that is present in all models of the Subject Products.

116. The harness designs in the Generation One and the Generation Two are defective because each design fails to adequately restrain the infant user.

117. The harness design in the Generation Two is also defective because the ''D''-shaped ring in the foam base must be secured after the cover is changed, and can also become loose with regular use of the product. Caregivers are not informed adequately of the importance of securing the harness straps to the ''D''-shaped rings embedded in the foam seat base and may use the product without securing the ''D''-shaped rings or ensuring that they are adequately tightened before each use.

118. The harness design in the Chill is defective because the double-threaded buckles inhibit a caregiver's ability to secure the harness around the infant user, thereby reducing the effectiveness of the harness and the likelihood of use of the harness by the caregiver.

119. Upon information and belief, Respondent has distributed over 150,000 Subject Products into U.S. commerce and the Chill continues to be available for purchase through Respondent's retail partners.

120. Upon information and belief, the severity of the risk associated with use of all of the Subject Products is extremely high, as five infants have died while using the Subject Products.

121. The Subject Products contain a defect, which creates a substantial risk of injury to children because of the pattern of defect, the number of such defective articles distributed in commerce and the severity of the risk within the meaning of Section 15(c)(1) of the FHSA, 15 U.S.C. § 1274(c)(1).

Relief Sought

Wherefore, in the public interest, Complaint Counsel requests that the Commission:

A. Determine that the Subject Products present a ''substantial product hazard'' within the meaning of Section 15(a)(2) of the CPSA, 15 U.S.C. 2064(a)(2), and/or present a ''substantial product hazard'' within the meaning of Section 15(a)(1) of the CPSA, 15 U.S.C. 2064(a)(1).

B. Determine that the Subject Products contain a defect, which creates a substantial risk of injury to children because of the pattern of defect, the number of such articles distributed in commerce, the severity of the risk, or otherwise, within the meaning of Section 15(c)(1) of the FHSA, 15 U.S.C. 1274(c)(1).

C. Determine that extensive and effective public notification under Section 15(c) of the CPSA, 15 U.S.C. 2064(c), is required to protect the public and children adequately from the substantial product hazard presented by the Subject Products, and order Respondent under Section 15(c) of the CPSA, 15 U.S.C. 2064(c) to:

(1) Cease any remaining distribution of the product to other distributors, wholesalers or retailers;

(2) Notify all persons that transport, store, distribute or otherwise handle the Subject Products, or to whom such products have been transported, sold, distributed or otherwise handled, to immediately cease distribution of the Subject Products;

(3) Notify appropriate state and local public health officials;

(4) Give prompt public notice of the defects in the Subject Products, including the incidents and injuries associated with use of the Subject Products including posting clear and conspicuous notice on Respondent's Web site, and providing notice to any third party Web site on which Respondent has placed the Subject Products for sale, and provide further announcements in languages other than English and on radio and television;

(5) Mail notice to each distributor or retailer of the Subject Products; and

(6) Mail notice to every person to whom the Subject Products were delivered or sold;

D. Determine that extensive and effective public notification under Section 15(c)(1)(A) of the FHSA, 15 U.S.C. 1274(c)(1), is required to protect the public and children adequately from the substantial product hazard presented by the Subject Products, and order Respondent under Section 15(c) of the FHSA, 15 U.S.C. 1274(c)(1)(A) to:

(1) To give public notice that such defective toy or article contains a defect which creates a substantial risk of injury to children;

(2) To mail such notice to each person who is a manufacturer, distributor, or dealer of such toy or article; and

(3) To mail such notice to every person to whom the person giving notice knows such toy or article was delivered or sold.

E. Determine that action under Section 15(d) of the CPSA, 15 U.S.C. 2064(d) and Section 15(c)(2) of the FHSA, 15 U.S.C. 1274(c)(2), is in the public interest and additionally order Respondent to:

(1) Refund consumers the purchase price of the Subject Products;

(2) Make no charge to consumers and to reimburse consumers for any reasonable and foreseeable expenses incurred in availing themselves of any remedy provided under any Commission Order issued in this matter, as provided by Section 15 U.S.C. 2064(e)(1) of the CPSA and Section 15 U.S.C. 1274(d)(1) of the FHSA;

(3) Reimburse retailers for expenses in connection with carrying out any Commission Order issued in this matter, including the costs of returns, refunds and/or replacements, as provided by Section 15(e)(2) of the CPSA, 15 U.S.C. 2064(e)(2) and Section 15(d)(2) of the FHSA, 15 U.S.C. 1274(d)(2);

(4) Submit a corrective action program satisfactory to the Commission, within ten (10) days of service of the Final Order, directing that actions specified in Paragraphs C(1) through (6) and D(1) through (3) above be taken in a timely manner;

(5) To submit monthly reports, in a format satisfactory to the Commission, documenting the progress of the corrective action program;

(6) For a period of five (5) years after issuance of the Final Order in this matter, to keep records of its actions taken to comply with Paragraphs C(1) through (6) and D(1) through (3) above, and supply these records to the Commission for the purpose of monitoring compliance with the Final Order; and

(7) For a period of five (5) years after issuance of the Final Order in this matter, to notify the Commission at least sixty (60) days prior to any change in its business (such as incorporation, dissolution, assignment, sale, or petition for bankruptcy) that results in, or is intended to result in, the emergence of a successor corporation, going out of business, or any other change that might affect compliance obligations under a Final Order issued by the Commission in this matter.

F. Order that Respondent shall take other and further actions as the Commission deems necessary to protect the public health and safety and to comply with the CPSA and FHSA.

Issued By Order of the Commission: Dated this __ day of December, 2012.

BY: Marc Schoem
Acting Assistant Executive Director for Compliance and Field Operations

U.S. Consumer Product Safety Commission, Bethesda, MD 20814, Tel: (301) 504–7520.

Mary B. Murphy, Assistant General Counsel, Division of Compliance, Office of General Counsel, U.S. Consumer Product Safety Commission, Bethesda, MD 20814, Tel: (301) 504–7809.

Kelly Moore, Trial Attorney, Complaint Counsel, Division of Compliance, Office of the General Counsel, U.S. Consumer Product Safety Commission, Bethesda, MD 20814, Tel: (301) 504–7447.

Certificate of Service

I hereby certify that on December __, 2012, I served the foregoing Complaint and List of Summary and Documentary Evidence upon all parties of record in these proceedings by hand-delivering and mailing, certified mail, postage prepaid, a copy to each at their principal place of business, and courtesy copy to counsel, as follows:

Baby Matters LLC, 531 Winston Way, Berwyn, PA 19312.

Raymond G. Mullady, Jr., BLANK ROME LLP, Watergate, 600 New Hampshire Avenue NW., Washington, DC 20037, Counsel for Baby Matters LLC.

Mary B. Murphy, Complaint Counsel for U.S. Consumer Product Safety Commission.

[FR Doc. 2012–29760 Filed 12–10–12; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2012–ICCD–0030]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and approval; Comment Request; Student Assistance General Provisions—Non-Title IV Revenue Requirements (90/10)

AGENCY: Department of Education (ED), Federal Student Aid (FSA).

ACTION: Notice

SUMMARY: In accordance with the Paperwork Reduction of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before January 10, 2013.

ADDRESSES: Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting Docket ID number ED–2012–ICCD–0030 or via postal mail, commercial delivery, or hand delivery. Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW, LBJ, Room 2E105, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: Electronically mail *ICDocketMgr@ed.gov*. Please do not send comments here.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Student Assistance General Provisions—Non-Title IV Revenue Requirements (90/10).

OMB Control Number: 1845–0096.

Type of Review: Extension of an existing information collection.

Respondents/Affected Public: Private Sector (Business or for-profit institutions).

Total Estimated Number of Annual Responses: 2,201.

Total Estimated Number of Annual Burden Hours: 3,302 .

Abstract: As provided by the Higher Education Opportunity Act (Pub. L. 110–315), the regulations provide that a proprietary institution must derive at least 10% of its annual revenue from sources other than Title IV, Higher Education Act (HEA) funds, sanctions for failing to meet this requirement, and otherwise implement the statute by (1) Specifying a Net Present Value (NPV) formula used to establish the revenue for institutional loans, (2) providing an administratively easier alternative to the NPV calculation, and (3) describing more fully the non-Title IV eligible programs from which revenue may be counted for 90/10 purposes. The regulations require an institution to disclose in a footnote to its audited financial statements the amounts of Federal and non-Federal revenues, by category, that it used in calculating its 90/10 ratio (see section 487(d) of the HEA). This request is for extending approval of reporting requirements contained in the regulations related to the administrative requirements of the non-Title IV revenue requirement (90/10) program. The information collection requirements in the regulations are necessary to determine eligibility to receive program benefits and to prevent fraud and abuse of program funds.

Dated: December 5, 2012.

Stephanie Valentine,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2012–29817 Filed 12–10–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

2012 LNG Export Study

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Notice of availability of 2012 LNG Export Study and request for comments.

Freeport LNG Expansion, L.P. and FLNG Liquefaction, LLC	[FE Docket No. 10–161–LNG]
Lake Charles Exports, LLC	[FE Docket No. 11–59–LNG]
Dominion Cove Point LNG, LP	[FE Docket No. 11–128–LNG]
Carib Energy (USA) LLC	[FE Docket No. 11–141–LNG]
Freeport LNG Expansion, L.P. and FLNG Liquefaction, LLC	[FE Docket No. 11–161–LNG]
Cameron LNG, LLC Gulf	[FE Docket No. 11–162–LNG]
Gulf Coast LNG Export, LLC	[FE Docket No. 12–05–LNG]
Jordan Cove Energy Project, L.P	[FE Docket No. 12–32–LNG]
LNG Development Company, LLC (d/b/a Oregon LNG)	[FE Docket No. 12–77–LNG]
Cheniere Marketing, LLC	[FE Docket No. 12–97–LNG]
Southern LNG Company, L.L.C	[FE Docket No. 12–100–LNG]
Gulf LNG Liquefaction Company, LLC	[FE Docket No. 12–101–LNG]
CE FLNG, LLC	[FE Docket No. 12–123–LNG]
Excelerate Liquefaction Solutions I, LLC	[FE Docket No. 12–146–LNG]
Golden Pass Products LLC	[FE Docket No. 12–156–LNG]

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice of the availability of a liquefied natural gas (LNG) export cumulative impact study (LNG Export Study) in the above-referenced proceedings and invites the submission of initial and reply comments regarding the LNG Export Study. DOE commissioned the LNG Export Study to inform DOE's decisions on applications seeking authorization to export LNG from the lower-48 states to non-free trade agreement (FTA) countries.[1] The LNG Export Study consisted of two parts. The first part, performed by the Energy Information Administration (EIA) and originally published in January 2012, assessed how specified scenarios of increased natural gas exports could affect domestic energy markets. The second part, performed by NERA Economic Consulting (NERA) under contract to DOE, evaluated the macro-economic impact of LNG exports on the U.S. economy using a general equilibrium macroeconomic model of the U.S. economy with an emphasis on the energy sector and natural gas in particular. DOE may use the LNG Export Study to inform its decision in the listed proceedings and for other purposes. Comments submitted in compliance with the instructions in this notice will be placed in the administrative record for all of the above-listed proceedings and need only be submitted once.

DATES: Initial comments are to be filed using procedures detailed in the Public Comment Procedures section no later than 4:30 p.m., eastern time, January 24, 2013. Reply comments are to be filed using the same procedures and will be accepted for filing from January 25, 2013, until 4:30 p.m., eastern time, February 25, 2013.

ADDRESSES:

Electronic Filing by email: LNGStudy@hq.doe.gov.

Regular Mail: U.S. Department of Energy (FE–34), Office of Natural Gas Regulatory Activities, Office of Fossil Energy, P.O. Box 44375, Washington, DC 20026–4375.

Hand Delivery or Private Delivery Services (e.g., FedEx, UPS, etc.): U.S. Department of Energy (FE–34), Office of Natural Gas Regulatory Activities, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT:

John Anderson, U.S. Department of Energy (FE–34), Office of Natural Gas Regulatory Activities, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–0521.

Edward Myers, U.S. Department of Energy, Office of the Assistant General Counsel for Electricity and Fossil Energy, Forrestal Building, Room 6B–256, 1000 Independence Ave. SW., Washington, DC 20585, (202) 586–3397.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to section 3 of the Natural Gas Act, 15 U.S.C. 717b, exports of natural gas, including LNG, must be

[1] The LNG Export Study did not consider the impact of exports of Alaska natural gas production. Because there is no natural gas pipeline interconnection between Alaska and the lower-48 states, the macroeconomic consequences of exporting LNG from Alaska are likely to be discrete and separate from those of exporting from the lower-48 states.

authorized by DOE/FE.[2] Applications that seek authority to export natural gas to countries with which the United States has not entered into a free trade agreement providing for national treatment for trade in natural gas (non-FTA nations) are presumed to be in the public interest unless, after opportunity for a hearing, DOE finds that the authorizations would not be consistent with the public interest.

On May 20, 2011, in *Sabine Pass Liquefaction, LLC,* Opinion and Order No. 2961 (*Sabine Pass*), DOE issued a conditional authorization to Sabine Pass Liquefaction, LLC for exports to non-FTA nations.[3] Due to its receipt of other applications to export LNG to non-FTA nations, and in anticipation of additional applications, DOE cautioned in Order No. 2961 that it has a continuing duty to monitor supply and demand conditions in the United States in order to ensure that authorizations to export LNG do not subsequently lead to a reduction in the supply of natural gas needed to meet essential domestic needs. Order No. 2961 at 32. DOE further stated that it would evaluate the cumulative impact of the *Sabine Pass* authorization and any future export authorizations when considering subsequent applications for such authority. *Id.*

Like *Sabine Pass,* the 15 proceedings identified above involve applications submitted by the named parties seeking authorization to export LNG from the lower-48 states to non-FTA nations. In response, DOE commissioned a study, consisting of two separate parts, of the economic impacts of granting these types of applications. The purpose of this Notice is to post the LNG Export Study in the 15 proceedings, and to invite initial and reply comments on the LNG Export Study, as applied to the pending matters. The LNG Export Study and the comments that DOE/FE receives in response to this Notice will help to inform our determination of the public interest in each case.

The LNG Export Study

In summary, the LNG Export Study includes:

- An analysis performed by the Energy Information Administration (EIA) and originally published in January 2012, entitled *Effect of Increased Natural Gas Exports on Domestic Energy Markets* (EIA Study), examining how specified scenarios of increased natural gas exports could affect domestic energy markets.
- An evaluation performed by NERA Economic Consulting (NERA), a private contractor retained by DOE, entitled *Macroeconomic Impacts of Increased LNG Exports From the United States* (NERA Study). The NERA analysis assessed the macroeconomic impact of LNG exports on the U.S. economy using a general equilibrium macroeconomic model of the U.S. economy with an emphasis on the energy sector and natural gas in particular.

The purpose of the LNG Export Study was to evaluate the cumulative economic impact of the *Sabine Pass* authorization and any future requests for authority to export LNG. At the time DOE commissioned the EIA analysis, it had issued the *Sabine Pass* conditional authorization and had received applications for authority to export LNG by vessel from two additional proposed liquefaction facilities. The combined granted and requested authority to export LNG to non-FTA nations at that time was the equivalent of 5.6 billion cubic feet per day (Bcf/day) of natural gas. Additionally, DOE had been contacted by other companies that were considering filing additional applications to export LNG to non-FTA nations in the Fall of 2011. The approximate volume under consideration for export from these companies was equivalent to approximately another 6 Bcf/day of natural gas.

Given the growing interest in exporting LNG from the lower-48 states, DOE designed the scope of the first part of the LNG Export Study, performed by EIA, to understand the implications of additional natural gas demand (as exports) on domestic energy markets under various scenarios. The scenarios established were not forecasts of either the ultimate level, or rates of increase, of exports; instead, these scenarios were established to set a wide range of potential LNG export scenarios, as assessed by DOE at that time.

However, the EIA analysis did not address the macroeconomic impacts of natural gas exports on the U.S. economy. In particular, given its domestic focus, EIA's National Energy Modeling System does not account for the impact of energy price changes on the global utilization pattern for existing capacity or the siting of new capacity inside or outside of the United States in energy-intensive industries.

Therefore, DOE commissioned NERA to conduct such an analysis. The NERA macroeconomic analysis includes a feasibility analysis of exporting the specified quantities of natural gas used in the EIA analysis, as well as a range of additional global scenarios for natural gas supply and demand, including cases with no export constraints.

The NERA study is available on the DOE/FE Web site (*http://www.fossil.energy.gov/programs/gasregulation/LNGStudy.html*). The EIA study remains available on the EIA Web site (*www.eia.gov/analysis/requests/fe*). Electronic links to both parts have been posted to the 15 listed dockets.

Key Findings of the NERA Study

The Executive Summary of the NERA Study sets forth several key findings regarding the macroeconomic impacts of permitting exports of LNG from the lower-48 states. DOE does not take a position regarding these findings at this time. However, given the complexity of the NERA Study, and in order to help focus the comments being solicited by this Request, it is worthwhile to set out NERA's key findings *verbatim.* In considering NERA's findings, commenters are urged to keep in mind that the NERA Study was performed by an independent non-governmental organization under contract to DOE and that its findings are NERA's own findings, not those of DOE. The NERA Study's key findings, as presented in the NERA Study's Executive Summary are as follows:

> This report contains an analysis of the impact of exports of LNG on the U.S. economy under a wide range of different assumptions about levels of exports, global market conditions, and the cost of producing natural gas in the U.S. These assumptions were combined first into a set of scenarios that explored the range of fundamental factors driving natural gas supply and demand. These market scenarios ranged from relatively normal conditions to stress cases with high costs of producing natural gas in the U.S. and exceptionally large demand for U.S. LNG exports in world markets. The economic impacts of different limits on LNG exports were examined under each of the market scenarios. Export limits were set at levels that ranged from zero to unlimited in each of the scenarios.
>
> Across all these scenarios, the U.S. was projected to gain net economic benefits from allowing LNG exports. Moreover, for every one of the market scenarios examined, net economic benefits increased as the level of LNG exports increased. In particular, scenarios with unlimited exports always had higher net economic benefits than corresponding cases with limited exports.
>
> In all of these cases, benefits that come from export expansion more than outweigh the losses from reduced capital and wage

[2] The authority to regulate the imports and exports of natural gas, including liquefied natural gas, under section 3 of the NGA (15 U.S.C. § 717b) has been delegated to the Assistant Secretary for FE in Redelegation Order No. 00–002.04E (issued April 29, 2011).

[3] On August 7, 2012, DOE/FE issued Order No. 2961–A, A Final Opinion and Order Granting Long-Term Authority To Export LNG From Sabine Pass LNG Terminal to Non-Free Trade Agreement Nations.

income to U.S. consumers, and hence LNG exports have net economic benefits in spite of higher domestic natural gas prices. This is exactly the outcome that economic theory describes when barriers to trade are removed.

Net benefits to the U.S. would be highest if the U.S. becomes able to produce large quantities of gas from shale at low cost, if world demand for natural gas increases rapidly, and if LNG supplies from other regions are limited. If the promise of shale gas is not fulfilled and costs of producing gas in the U.S. rise substantially, or if there are ample supplies of LNG from other regions to satisfy world demand, the U.S. would not export LNG. Under these conditions, allowing exports of LNG would cause no change in natural gas prices and do no harm to the overall economy.

U.S. natural gas prices increase when the U.S. exports LNG. But the global market limits how high U.S. natural gas prices can rise under pressure of LNG exports because importers will not purchase U.S. exports if U.S. wellhead price rises above the cost of competing supplies. In particular, the U.S. natural gas price does not become linked to oil prices in any of the cases examined.

Natural gas price changes attributable to LNG exports remain in a relatively narrow range across the entire range of scenarios. Natural gas price increases at the time LNG exports could begin range from zero to $0.33 (2010 $/Mcf). The largest price increases that would be observed after 5 more years of potentially growing exports could range from $0.22 to $1.11 (2010 $/Mcf). The higher end of the range is reached only under conditions of ample U.S. supplies and low domestic natural gas prices, with smaller price increases when U.S. supplies are more costly and domestic prices higher.

How increased LNG exports will affect different socio-economic groups will depend on their income sources. Like other trade measures, LNG exports will cause shifts in industrial output and employment and in sources of income. Overall, both total labor compensation and income from investment are projected to decline, and income to owners of natural gas resources will increase. Different socio-economic groups depend on different sources of income, though through retirement savings an increasingly large number of workers share in the benefits of higher income to natural resource companies whose shares they own. Nevertheless, impacts will not be positive for all groups in the economy. Households with income solely from wages or government transfers, in particular, might not participate in these benefits.

Serious competitive impacts are likely to be confined to narrow segments of industry. About 10% of U.S. manufacturing, measured by value of shipments, has both energy expenditures greater than 5% of the value of its output and serious exposure to foreign competition. Employment in industries with these characteristics is about one-half of one percent of total U.S. employment.

LNG exports are not likely to affect the overall level of employment in the U.S. There will be some shifts in the number of workers across industries, with those industries associated with natural gas production and exports attracting workers away from other industries. In no scenario is the shift in employment out of any industry projected to be larger than normal rates of turnover of employees in those industries.

NERA Study at 1–2.

Invitation to Comment

DOE invites comments regarding the LNG Export Study that will help to inform DOE in its public interest determinations of the authorizations sought in the 15 pending applications. Comments must be limited to the results and conclusions of these independent analyses on the factors evaluated. These factors include the impact of LNG exports on: domestic energy consumption, production, and prices, and particularly the macroeconomic factors identified in the NERA analysis, including Gross Domestic Product (GDP), welfare analysis, consumption, U.S. economic sector analysis, and U.S. LNG export feasibility analysis, and any other factors included in the analyses. In addition, comments can be directed toward the feasibility of various scenarios used in both analyses. While this invitation to comment covers a broad range of issues, the Department may disregard comments that are not germane to the present inquiry. Moreover, no final decisions will be issued in the 15 pending proceedings until DOE has received and evaluated the comments requested herein.

Public Comment Procedures

DOE is not establishing a new proceeding or docket by today's issuance and the submission of comments in response to this Notice will not make commenters parties to any of the pending 15 cases. Persons with an interest in the outcome of one or more of the 15 pending matters have been given an opportunity to intervene in or protest those pending matters by complying with the procedures established in the respective notices of application issued in the pending 15 matters and published in the **Federal Register**.[4]

The record in the 15 pending proceedings will include all comments received in response to this Notice. Initial and reply comments will be reviewed on a consolidated basis for purposes of hearing, and decisions will be issued on a case-by-case basis. In addition to the procedures established by this Notice, all comments must meet the applicable requirements of DOE's regulations at 10 CFR part 590. The more specific your comments, the more useful they will be.

Reply comments should be directed toward matters specifically addressed in initial comments and should not introduce new issues not previously raised by other commenters. Reply comments will not be accepted until the opportunity for filing initial comments has run.

Comments may be submitted using one of the following methods: (1) Emailing the filing to *LNGStudy@hq.doe.gov*; (2) mailing an original and three paper copies of the filing to the Office of Natural Gas Regulatory Activities at the address listed in **ADDRESSES**; or (3) hand delivering an original and three paper copies of the filing to the Office of Natural Gas Regulatory Activities at the address listed in **ADDRESSES**.

All comments and reply comments submitted in response to this Notice should reference the ''2012 LNG Export Study'' in the title line. Any comments greater than 5 pages, double-spaced, in length must be submitted in electronic format.

The 2012 LNG Export Study is available for inspection and copying in the Office of Natural Gas Regulatory Activities docket room, Room 3E–042, 1000 Independence Avenue, SW., Washington, DC 20585. The docket room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. All initial and reply comments filed in response to this Notice will be available electronically by going to the following DOE/FE Web address: *http://*

[4] Notices of application in 12 of the pending cases were published in the **Federal Register** as follows: *Freeport LNG Expansion, L.P. and FLNG Liquefaction, LLC,* FE Docket No. 10–161–LNG, 76 FR4885 (January 27, 2011); *Lake Charles Exports, LLC,* FE Docket No. 11–59–LNG, 76 FR 34212 (June 13, 2011); *Dominion Cove Point LNG, LP,* FE Docket No. 11–128–LNG, 76 FR 76698 (December 8, 2011); *Carib Energy (USA) LLC,* FE Docket No. 11–141–LNG, 76 FR 80913 (December 12, 2011); *Freeport LNG Expansion, L.P. and FLNG Liquefaction, LLC,* FE Docket No. 11–161–LNG, 77 FR 7568 (February 13, 2012); *Cameron LNG, LLC,* FE Docket No. 11–162–LNG, 77 FR 10732 (February 23, 2012); *Gulf Coast LNG Export, LLC,* FE Docket No. 12–05–LNG, 77 FR 32962 (June 4, 2012); *Jordan Cove Energy Project, L.P.,*FE Docket No. 12–32–LNG, 77 FR 33446 (June 6, 2012); *LNG Development Company, LLC (d/b/a Oregon LNG),* FE Docket No. 12–77–LNG, 77 FR 55197 (September 7, 2012); Southern LNG Company, L.L.C., FE Docket No. 12–100–LNG, 77 FR 63806 (October 17, 2012); Cheniere Marketing, LLC, FE Docket No. 12–097–LNG, 77 FR 64964 (October 24, 2012); and Gulf LNG Liquefaction Company, LLC FE Docket No. 12–101–LNG, 77 FR 66454, (November 5, 2012). Comments will be received in three other proceedings in which the notices of application were issued by DOE/FE on November 30, 2012, but have not yet posted to the **Federal Register**, including *CE FLNG, LLC,* FE Docket No. 12–123–LNG; *Excelerate Liquefaction Solutions I, LLC,* FE Docket No. 12–146–LNG; and *Golden Pass Products LLC,* FE Docket No. 12–156–LNG..

www.fossil.energy.gov/programs/gasregulation/LNGStudy.html.

Issued in Washington, DC, on December 5, 2012.

John A. Anderson,

Manager, Natural Gas Regulatory Activities, Office of Oil and Gas Global Security and Supply, Office of Fossil Energy.

[FR Doc. 2012–29894 Filed 12–10–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC12–19–000]

Commission Information Collection Activities (FERC–732); Comment Request

AGENCY: Federal Energy Regulatory Commission.

ACTION: Comment request.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507(a)(1)(D), the Federal Energy Regulatory Commission (Commission or FERC) is submitting the information collection FERC–732 (Electric Rate Schedules and Tariffs: Long-Term Firm Transmission Rights in Organized Electricity Markets) to the Office of Management and Budget (OMB) for review of the information collection requirements. Any interested person may file comments directly with OMB and should address a copy of those comments to the Commission as explained below. The Commission issued a Notice in the **Federal Register** (77 FR 58116, 9/19/2012) requesting public comments. FERC received no comments on the FERC–732 and is making this notation in its submittal to OMB.

DATES: Comments on the collection of information are due by January 10, 2013.

ADDRESSES: Comments filed with OMB, identified by the OMB Control No. 1902–0245, should be sent via email to the Office of Information and Regulatory Affairs: *oira_submission@omb.gov.* Attention: Federal Energy Regulatory Commission Desk Officer. The Desk Officer may also be reached via telephone at 202–395–4718.

A copy of the comments should also be sent to the Federal Energy Regulatory Commission, identified by the Docket No. IC12–19–000, by either of the following methods:

- *eFiling at Commission's Web Site: http://www.ferc.gov/docs-filing/efiling.asp.*
- *Mail/Hand Delivery/Courier:* Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

Instructions: All submissions must be formatted and filed in accordance with submission guidelines at: *http://www.ferc.gov/help/submission-guide.asp.* For user assistance contact FERC Online Support by email at *ferconlinesupport@ferc.gov,* or by phone at: (866) 208–3676 (toll-free), or (202) 502–8659 for TTY.

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at *http://www.ferc.gov/docs-filing/docs-filing.asp.*

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by email at *DataClearance@FERC.gov,* by telephone at (202) 502–8663, and by fax at (202) 273–0873.

SUPPLEMENTARY INFORMATION:

Title: FERC–732, Electric Rate Schedules and Tariffs: Long-Term Firm Transmission Rights in Organized Electricity Markets.

OMB Control No.: 1902–0245.

Type of Request: Three-year extension of the FERC–732 information collection requirements with no changes to the reporting requirements.

Abstract: 18 CFR Part 42 provides the reporting requirements of FERC–732 as they pertain to long-term transmission rights. To implement section 1233 of the Energy Policy Act of 2005 (EPAct 2005),[1] the Commission requires each transmission organization that is a public utility with one or more organized electricity markets to make available long-term firm transmission rights that satisfy each of the Commission's guidelines.

The FERC–732 regulations require that transmission organizations (that are public utilities with one or more organized electricity markets) choose one of two ways to file:

- File tariff sheets making long-term firm transmission rights available that are consistent with each of the guidelines established by FERC.
- File an explanation describing how their existing tariffs already provide long-term firm transmission rights that are consistent with the guidelines.

Additionally, the Commission requires each transmission organization to make its transmission planning and expansion procedures and plans available to the public.

FERC–732 enables the Commission to exercise its wholesale electric rate and electric power transmission oversight and enforcement responsibilities in accordance with the FPA, the Department of Energy Organization Act (DOE Act), and EPAct 2005.

The Commission intends to include the FERC–732 and all of its applicable requirements within FERC–516 (OMB Control No. 1902–0096). The Commission will ensure complete renewal (to include publishing all public notifications and receiving Office of Management and Budget approval) of FERC–732 information collection. After the collection is renewed, the Commission will seek to incorporate administratively FERC–732 information collection requirements into FERC–516. Finally, the Commission will discontinue the vacant FERC–732 information collection.

Type of Respondents: Public utility with one or more organized electricity markets.

Estimate of Annual Burden: [2] The Commission estimates the total Public Reporting Burden for this information collection as:

[1] Public Law 109–58.

[2] Burden is defined as the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For further explanation of what is included in the information collection burden, reference 5 Code of Federal Regulations 1320.3.

FERC–732 (IC12–19–000): ELECTRIC RATE SCHEDULES AND TARIFFS: LONG-TERM FIRM TRANSMISSION RIGHTS IN ORGANIZED ELECTRICITY MARKETS

	Number of respondents (A)	Number of responses per respondent (B)	Total number of responses (A) × (B) = C	Average burden hours per response (D)	Estimated total annual burden (C) × (D)
Public utility with 1 or more organized electricity markets ..	1	1	1	1,180	1,180

The total estimated annual cost burden to respondents is $81,431.68 [1,180 hours ÷ 2080 hours per year = 0.56731 * $143,540/years = $81,431.68].

Comments: Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Dated: November 28, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–29806 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC12–18–000]

Commission Information Collection Activities (FERC–500 and FERC–505); Comment Request

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Comment request.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995, 44 USC 3507(a)(1)(D), the Federal Energy Regulatory Commission (Commission or FERC) is submitting the information collections Application for License/ Relicense for Water Projects with Greater than 5 Megawatt Capacity (FERC–500), and Application for License/Relicense for Water Projects with 5 Megawatt or Less Capacity (FERC–505) to the Office of Management and Budget (OMB) for review of the information collection requirements. Any interested person may file comments directly with OMB and should address a copy of those comments to the Commission as explained below. The Commission issued a Notice in the **Federal Register** (77 FR 56636, 09/13/2012) requesting public comments. FERC received no comments on the FERC–500 and FERC–505 and is making this notation in its submittal to OMB.

DATES: Comments on the collections of information are due by January 10, 2013.

ADDRESSES: Comments filed with OMB, identified by the OMB Control Nos. 1902–0058 (FERC–500) and/or 1902–0114 (FERC–505), should be sent via email to the Office of Information and Regulatory Affairs: *oira_submission@omb.gov,* Attention: Federal Energy Regulatory Commission Desk Officer. The Desk Officer may also be reached via telephone at 202–395–4718.

A copy of the comments should also be sent to the Federal Energy Regulatory Commission, identified by the Docket No. IC12–18–000, by one of the following methods:

- *eFiling at Commission's Web Site: http://www.ferc.gov/docs-filing/efiling.asp.*
- *Mail/Hand Delivery/Courier:* Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

Instructions: All submissions must be formatted and filed in accordance with submission guidelines at: *http://www.ferc.gov/help/submission-guide.asp.* For user assistance contact FERC Online Support by email at *ferconlinesupport@ferc.gov,* or by phone at: (866) 208–3676 (toll-free), or (202) 502–8659 for TTY.

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at *http://www.ferc.gov/docs-filing/docs-filing.asp.*

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by email at *DataClearance@FERC.gov,* by telephone at (202) 502–8663, and by fax at (202) 273–0873.

SUPPLEMENTARY INFORMATION:

Titles: FERC–500: Application for License/Relicense for Water Projects with Greater than 5 Megawatt Capacity; FERC–505: Application for License/ Relicense for Water Projects with 5 Megawatt or Less Capacity.

OMB Control Nos.: FERC–500 (1902–0058); FERC–505 (1902–0114).

Type of Request: 16 U.S.C. 797(e) authorizes the Commission to issue licenses to citizens of the United States for the purpose of constructing, operating, and maintaining dams, across, along, from, or within waterways over which Congress has jurisdiction. The Electric Consumers Protection Act amended the Federal Power Act to provide the Commission with the responsibility of issuing licenses for non-federal hydroelectric plants. 16 U.S.C. 797(e) also requires the Commission to give equal consideration to preserving energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife, the protection of recreational opportunities, and the preservation of other aspects of environmental quality when approving licenses. Finally, 16 U.S.C. 799 stipulates conditions upon which the Commission issues hydroelectric licenses.

The Commission requires all hydroelectric license applications to address a variety of environmental concerns. Many of these concerns address environmental requirements developed by other agencies. The applicants must provide facts in order for the Commission to understand and resolve potential environmental problems associated with the application in the interests of the United States public.

Types of Respondents: Non-federal hydroelectric plants greater than 5 megawatt capacity (FERC–500); non-federal hydroelectric plants less than 5 megawatts capacity (FERC–505).

Estimate of Annual Burden [1]: The Commission estimates the total Public

[1] The Commission defines burden as the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For

Continued

Reporting Burden for each information collection as:

FERC–500 (IC12–18–000): APPLICATION FOR LICENSE/RELICENSE FOR WATER PROJECTS WITH GREATER THAN 5 MEGAWATT CAPACITY

	Number of respondents (A)	Number of responses per respondent (B)	Total number of responses (A)*(B)=(C)	Average burden hours per response (D)	Estimated total annual burden (C)*(D)
Non-federal hydroelectric plants greater than 5 megawatt capacity	219	1	219	87	19,053

FERC–505 (IC12–18–000): APPLICATION FOR LICENSE/RELICENSE FOR WATER PROJECTS WITH 5 MEGAWATT OR LESS CAPACITY

	Number of respondents (A)	Number of responses per respondent (B)	Total number of responses (A)*(B)=(C)	Average burden hours per response (D)	Estimated total annual burden (C)*(D)
Non-federal hydroelectric plants less than 5 megawatts capacity	16	1	16	273	4,368

FERC–500 total estimated annual cost burden to respondents is $1,314,839.32 [(19,053 hours ÷ 2080 hours/year [2]) * $143,540/year [3] = $1,314,839.32]

FERC–505: total estimated annual cost burden to respondents is $301,502.90 [(4,368 hours ÷ 2080 hours/year) * $143,540/year = $301,434.00]

Comments: Comments are invited on: (1) Whether the collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden and cost of the collections of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collections; and (4) ways to minimize the burden of the collections of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Dated: December 5, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–29849 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 6641–090]

American Municipal Power, Inc; Notice of Application for Temporary Variance of License and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Non-capacity amendment of license.

b. *Project No:* 6641–090.

c. *Date Filed:* October 5, 2012.

d. *Applicant:* American Municipal Power, Inc.

e. *Name of Project:* Smithland Lock and Dam Project.

f. *Location:* The project is located on the Ohio River in Livingston County, Kentucky.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Phillip Meier, American Municipal Power, Inc., 1111 Schrock Road, Suite 100, Columbus, OH 43229 (614) 540–1111.

i. *FERC Contact:* Rebecca Martin, (202) 502–6012, *Rebecca.martin@ferc.gov.*

j. *Deadline for filing comments, motions to intervene, and protests:* January 7, 2013.

All documents may be filed electronically via the Internet. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp.* If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and seven copies should be mailed to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. Please include the project number (P–6641–090) on any comments or motions filed.

k. *Description of Application:* American Municapal Power, Inc. is proposing to reroute the approved transmission line route of 11-miles from the Smithland Powerhouse to its connection with Big Rivers Electric Corporation's (BREC) existing 161-kV Livingston County Substation. The new transmission line route would be reduced to 2.3 miles from the Smithland Powerhouse to its connection with BREC's existing 161-kV Renshaw to Livingston transmission line.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the

further explanation of what is included in the information collection burden, reference 5 Code of Federal Regulations 1320.3. The estimated burden for these collections has decreased significantly. For more explanation, see the supporting statement submitted to OMB at reginfo.gov (available when this notice publishes in the **Federal Register**).

[2] 2080 hours = 52 weeks * 40 hours per week (i.e. 1 year of full-time employment).

[3] Average salary plus benefits per full-time equivalent employee.

Commission's Public Reference Room, located at 888 First Street NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field (P–6641) to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* Any filing must (1) Bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). All comments, motions to intervene, or protests should relate to project works which are the subject of the amendment application. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. If an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Dated: December 4, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–29798 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP13–19–000; PF12–14–000]

Questar Pipeline Company; Notice of Application

Take notice that on November 21, 2012, Questar Pipeline Company (Questar), having its principal place of business at 333 South State Street, Salt Lake City, Utah, 84145–0360, filed an application in Docket No. CP13–19–000 pursuant to Section 7(c) of the Natural Gas Act (NGA) and Part 157 of the Commission's Regulations, for a certificate of public convenience and necessity to construct and operate approximately 14.7 miles of 16-inch diameter loop pipeline and related facilities. The proposed Jurisdictional Lateral (JL) 47 Loop Project will be located entirely within Duchesne County, Utah. The proposed project will loop Questar's existing JL 47 and will be generally collocated or parallel with Questar's existing facilities except where dictated by route constraints. The JL 47 Loop Project will extend north from its southern terminus at the intersection of Questar's existing Main Line (ML) 40 at Pete's Wash, to Questar's Brundage Mountain Tap, all as more fully set forth in the application, which is on file with the Commission and open to public inspection. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Any questions regarding this application should be directed to L. Bradley Burton, General Manager, Federal and Regulatory Affairs and FERC Compliance Officer, Questar Pipeline Company, 333 South State Street, P.O. Box 45360, Salt Lake City, Utah 84145–0360, or by calling (801) 324–2459 or email *brad.burton@questar.com.*

On May 18, 2012, the Commission staff granted Questar's request to use the pre-filing process and assigned Docket No. PF12–14–000 to staff activities involving the JL 47 Loop Project. Now, as of the filing of this application on November 21, 2012, the NEPA Pre-Filing Process for this project has ended. From this time forward, this proceeding will be conducted in Docket No. CP13–19–000, as noted in the caption of this Notice.

Pursuant to section 157.9 of the Commission's regulations, 18 CFR 157.9, within 90 days of this Notice, the Commission's staff will either complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission's staff issuance of the EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to reach a final decision on a request for federal authorization within 90 days of the date of issuance of the Commission staff's EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit

14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. See, 18 CFR 385.2001(a) (1) (iii) and the instructions on the Commission's web site under the ''e-Filing'' link.

Comment Date: December 26, 2012.

Dated: December 5, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–29851 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 11831–095]

Wisconsin Electric Power Company; Notice of Application Accepted for Filing, Ready for Environmental Analysis, Soliciting Comments, Motions To Intervene, Protests, Recommendations, Terms and Conditions, and Fishway Prescriptions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Amendment of License.

b. *Project No.:* 11831–095.

c. *Date Filed:* October 24, 2012.

d. *Applicant:* Wisconsin Electric Power Company.

e. *Name of Project:* Twin Falls Hydroelectric Project.

f. *Location:* The project is located on the Menominee River in Dickinson County, Michigan and Florence County, Wisconsin. The project occupies federal lands administered by the Bureau of Land Management.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Todd Jastremski, Manager, Hydroelectric Operations, Wisconsin Electric Power Company, 800 Industrial Park Drive, Iron Mountain, MI 49801, (906) 779–4099.

i. *FERC Contact:* Mr. Steven Sachs (202) 502–8666 or *Steven.Sachs@ferc.gov.*

j. Deadline for filing motions to intervene and protests, comments, recommendations, terms and conditions, and fishway prescriptions is 60 days from the issuance date of this notice; reply comments are due 105 days from the issuance date of this notice.

All documents may be filed electronically via the Internet. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp.* If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and seven copies should be mailed to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments.

Please include the project number (P–11831–095) on any comments, motions, recommendations, or terms and conditions filed.

k. *Description of Request:* The applicant proposes to construct a new powerhouse on the Wisconsin side of the river housing two turbine/generator units connected to the project's existing substation by an approximately 720-foot-long transmission line. The existing powerhouse and intake on the Michigan side would be demolished and a closure dam constructed across the forebay entrance. The applicant also proposes to construct a spillway containing three tainter gates adjacent to the proposed powerhouse. The middle and right dikes and the auxiliary spillway would be widened and strengthened to support an access road for the new powerhouse. The applicant also proposes to amend Article 408 of the project's license to remove the requirement for sediment sampling since sampling has already been performed in conjunction with preparations for the proposed construction. The proposal would raise the project's authorized installed capacity from 6,100 to 9,000 kilowatts.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp.* Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to

intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* All filings must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', ''MOTION TO INTERVENE'', ''TERMS AND CONDITIONS'' or ''FISHWAY PRESCRIPTIONS'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). All comments, motions to intervene, or protests should relate to project works which are the subject of the amendment. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. If an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Dated: November 29, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–29808 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP13–18–000; PF12–2–000]

Northwest Storage GP, LLC; Notice of Application

Take notice that on November 21, 2012, Northwest Storage GP, LLC. (Northwest) filed with the Federal Energy Regulatory Commission an application under section 7 of the Natural Gas Act to construct, and operate its Kalama Lateral Pipeline Project (Project). The project consists of installing approximately 3.1 miles of 16-inch diameter pipeline, metering facilities and miscellaneous appurtenances extending from Northwest's mainline at approximately milepost (MP) 1254 to a proposed 346-megawatt (MW) power plant located within the north industrial area of the Port of Kalama, all located in Cowlitz County, Washington. This project is designed to provide 62,888 decatherms per day of natural gas transportation service on the Kalama Lateral to serve a proposed power plant. The total cost of the project is estimated to be approximately $18,234,675, all as more fully set forth in the application which is on file with the Commission and open to public inspection. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Any questions regarding the application should be directed to Pam Barnes, Manager Certificates and Tariffs, Northwest Storage GP, LLC., 295 Chipeta Way, Salt Lake City, Utah 84108, by phone at 801–584–6857 or by email at *pam.j.barnes@williams.com.*

On November 18, 2011, the Commission staff granted Northwest's request to utilize the Pre-Filing Process and assigned Docket No. PF12–2–000 to staff activities involved the Kalama Lateral Pipeline Project. Now as of the filing the November 21, 2012 application, the Pre-Filing Process for this project has ended. From this time forward, this proceeding will be conducted in Docket No. CP13–18–000, as noted in the caption of this Notice.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit seven copies of filings made in the proceeding with the Commission and must mail a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors

will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and seven copies of the protest or intervention to the Federal Energy regulatory Commission, 888 First Street NE., Washington, DC 20426.

Comment Date: December 24, 2012.

Dated: December 3, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–29799 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14345–001]

Rock River Beach, Inc.; Notice of Application Tendered for Filing With the Commission and Soliciting Additional Study Requests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Original Minor License.

b. *Project No.:* P–14345–001.

c. *Date filed:* November 23, 2012.

d. *Applicant:* Rock River Beach, Inc.

e. *Name of Project:* Rock River Beach Hydroelectric Project.

f. *Location:* On the Rock River, in the Town of Onota, Alger County, Michigan.

g. *Filed Pursuant to:* Federal Power Act 16 USC 791(a)–825(r).

h. *Applicant Contact:* Mary C. Edgar, 2617 Rockwood, East Lansing, MI 48823; or by telephone at (906) 892–8112.

i. *FERC Contact:* Aaron Liberty at (202) 502–6862 or by email at *Aaron.Liberty@ferc.gov*.

j. *Cooperating agencies:* Federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item l below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See,* 94 FERC ¶ 61,076 (2001).

k. Pursuant to section 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from the date of filing of the application, and serve a copy of the request on the applicant.

l. Deadline for filing additional study requests and requests for cooperating agency status: January 22, 2013.

All documents may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp*. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

m. The application is not ready for environmental analysis at this time.

n. *The Rock River Beach Project consists of the following existing facilities:* (1) A 33.6-foot-long by 5.5-foot-high, L-shaped gravity dam with a crest elevation of 606.95 feet NAVD 88; (2) a 5-acre reservoir with a total storage capacity of about 25 acre-feet at the normal reservoir water surface elevation of 606.95 feet NAVD 88; (3) a 30-foot-wide by 50-foot-long power canal; (4) an 18-foot by 24-foot wood-framed powerhouse housing a 3-kilowatt (kW) generating unit and a 5-kW generating unit for a total installed capacity of 8 kW; and (5) two, 220-volt, 0.5-mile-long transmission lines.

The applicant operates the project in a run-of-river mode (i.e., at any point in time, the combined outflow from the project's dam and powerhouse approximates all inflows to the project's reservoir). Diversion of river flow through the 50-foot-long power canal and to the powerhouse creates a 100-foot-long bypassed reach in the Rock River. Average annual generation at the project varies between 9,000 and 18,000 kilowatt-hours.

All of the existing project facilities are owned by the applicant. The applicant proposes no new facilities.

The proposed project is currently unlicensed and was found to be jurisdictional, because it is located on a Commerce Clause water and affects the interests of interstate commerce. *See,* 103 FERC ¶ 62,180 (2003).

o. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

p. With this notice, we are initiating consultation with the Michigan State Historic Preservation Officer (SHPO), as required by section 106 of the National Historic Preservation Act and the regulations of the Advisory Council on Historic Preservation, 36 CFR 800.4.

q. *Procedural schedule:* The application will be processed according to the following preliminary Hydro Licensing Schedule. Revisions to the schedule will be made as appropriate.

Issue Notice of Acceptance—February 2013

Issue Scoping Document 1 for comments—March 2013

Comments due on Scoping Document 1—April 2013

Issue Scoping Document 2—May 2013

Issue notice of ready for environmental analysis—July 2013

Issue Environmental Assessment (EA)—December 2013

Comments due on EA—January 2013

Dated: November 30, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–29802 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 11797–043]

Grande Pointe Power Corporation; Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Amendment of License.

b. *Project No.:* P–11797–043.

c. *Date Filed:* November 14, 2012.

d. *Applicant:* Grande Pointe Power Corporation.

e. *Name of Project:* Three Rivers Hydroelectric Project.

f. *Location:* The Three Rivers Hydroelectric Project is located on the St. Joseph River in the city of Three Rivers, St. Joseph County, Michigan.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Ms. Piper Title, P.E., Senior Civil Engineer, Lawson-Fisher Associates P.C., 525 West Washington Avenue, South Bend, Indiana 46601; Telephone: (574) 234–3167.

i. *FERC Contact:* Any questions on this notice should be addressed to Kelly Houff, Telephone (202) 502–6393 or *Kelly.Houff@ferc.gov.*

j. *Deadline for filing comments, motions to intervene, and protests:* 30 days from the issuance date of this notice.

Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov/docs-filing/efiling.asp*). Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system (*http://www.ferc.gov/docs-filing/ecomment.asp)* and must include name and contact information at the end of comments. The Commission strongly encourages electronic filings.

All documents (original and seven copies) filed by paper should be sent to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. Please include the project number (P–11797–043) on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all interveners filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

k. *Description of Application:* The licensee proposes to amend the water surface elevation requirement of the impoundment set forth in article 402 of the license for the Three Rivers Project. Specifically, the licensee proposes to operate with the impoundment elevation at 798 feet National Geodetic Vertical Datum 1929 (NGVD29) and any elevation fluctuation shall not exceed 0.25 foot. The current impoundment elevation requirement under article 402 of the license is 797 feet NGVD29 ± 0.25 foot. However, the licensee states in its amendment application that at the time of the license application and request for water quality certification, the licensee referred to the incorrect datum at some point. Therefore, the reservoir level license requirement referenced 797 feet NGVD29 instead of the historic operating level of 798 feet NGVD29, the elevation prior to license issuance. The licensee is attempting to correct the datum error with an amendment to its license, but since the project has historically operated at an impoundment water surface elevation of 798 feet NGVD29, no actual change in project operation is proposed.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site using the ''eLibrary'' link at *http://elibrary.ferc.gov/idmws/search/fercgensearch.asp.* Enter the docket number excluding the last three digits (P–11797) in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Any filings must bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers.

p. *Agency Comments:* Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Dated: November 29, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–29807 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP13–21–000]

Alliance Pipeline L.P.; Notice of Application

Take notice that on November 26, 2012, Alliance Pipeline L.P. (Alliance), 800, 605–5 Ave. SW., Calgary, Alberta, Canada T2P 3H5, filed an application in the above referenced docket pursuant to section 7(c) of the Natural Gas Act (NGA) to amend their certificate issued in Docket No. CP12–50–000. Alliance proposes to increase the certificated horsepower (HP) on the Tioga Lateral from 6,000 HP to 7,950 HP. Alliance states that this proposal will also increase the design capacity of the Tioga Lateral facilities from 106.5 million

cubic feet per day (MMcf/d) to 126.4 MMcf/d, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Any questions concerning this application may be directed to Brian Troicuk, Manager, Regulatory Affairs, Alliance Pipeline Ltd. on behalf of Alliance Pipeline L.P., 800, 605–5 Ave. SW., Calgary, Alberta, Canada T2P 3H5, by telephone at (403) 517–6354 or by email at *brian.troicuk@alliancepipline.com.*

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 7 copies of filings made in the proceeding with the Commission and must mail a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and seven copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: December 24, 2012.

Dated: December 3, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–29801 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12721–005]

Pepperell Hydro Company, LLC; Notice of Intent To File License Application, Filing of Pre-Application Document, and Approving Use of the Traditional Licensing Process

a. *Type of Filing:* Notice of Intent to File License Application and Request to Use the Traditional Licensing Process.

b. *Project No.:* 12721–005.

c. *Date Filed:* October 11, 2012 (revised on October 19, 2012).

d. *Submitted By:* Pepperell Hydro Company, LLC.

e. *Name of Project:* Pepperell Hydroelectric Project.

f. *Location:* On the Nashua River, in Middlesex County, Massachusetts. The project would not occupy lands of the United States.

g. *Filed Pursuant to:* 18 CFR 5.3 of the Commission's regulations.

h. *Potential Applicant Contact:* Mr. Peter Clark, Pepperell Hydro Company, LLC, P.O. Box 149, Hamilton, MA 01936, (978) 468–3999.

i. *FERC Contact:* Brandon Cherry, (202) 502–8328, or via email at *brandon.cherry@ferc.gov.*

j. Pepperell Hydro Company, LLC filed its request to use the Traditional Licensing Process on October 11, 2012 (revised on October 19, 2012). Pepperell Hydro Company, LLC provided public notice of its request on October 19 and 26, 2012. In a letter dated November 29, 2012, the Director of the Division of Hydropower Licensing approved the request to use the Traditional Licensing Process.

k. With this notice, we are initiating informal consultation with: (a) The U.S. Fish and Wildlife Service and/or NOAA Fisheries under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR, Part 402; (b) NOAA Fisheries under section 305(b) of the of the Magnuson-Stevens Fishery Conservation and Management Act and implementing regulations at 50 CFR 600.920; and (c) the Massachusetts Historical Commission, as required by section 106 of the National Historical Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. On November 20, 2012, Pepperell Hydro Company, LLC filed a Pre-Application Document (PAD) with the Commission, pursuant to 18 CFR 5.6 of the Commission's regulations.

m. A copy of the PAD is available for review at the Commission in the Public

Reference Room or may be viewed on the Commission's Web site (*http://www.ferc.gov*), using the ''eLibrary'' link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659.

n. Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Dated: November 29, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–29809 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2794–009; ER10–2849–008; ER11–2028–009; ER12–1825–007; ER11–3642–008.

Applicants: EDF Trading North America, LLC, EDF Industrial Power Services (NY), LLC, EDF Industrial Power Services (IL), LLC, EDF Industrial Power Services (CA), LLC, Tanner Street Generation, LLC.

Description: Notice of Non-Material Change in Status of EDF Trading North America, LLC, *et al.*

Filed Date: 12/3/12.

Accession Number: 20121203–5192.

Comments Due: 5 p.m. ET 12/24/12.

Docket Numbers: ER11–3576–006; ER11–3401–007.

Applicants: Golden Spread Electric Cooperative, Inc., Golden Spread Panhandle Wind Ranch, LLC.

Description: Notice of Non-Material Change in Status of Golden Spread Electric Cooperative, Inc. and Golden Spread Panhandle Wind Ranch, LLC.

Filed Date: 12/3/12.

Accession Number: 20121203–5191.

Comments Due: 5 p.m. ET 12/24/12.

Docket Numbers: ER13–281–000.

Applicants: Star Energy Partners LLC.

Description: Supplemental Information of Star Energy Partners.

Filed Date: 11/23/12.

Accession Number: 20121123–5024.

Comments Due: 5 p.m. ET 12/10/12.

Docket Numbers: ER13–504–000.

Applicants: Electricity NH, LLC.

Description: Electricity NH, LLC submits tariff filing per 35.1: Electricity New Hampshire FERC Tariff to be effective 12/4/2012.

Filed Date: 12/3/12.

Accession Number: 20121203–5167.

Comments Due: 5 p.m. ET 12/24/12.

Docket Numbers: ER13–505–000.

Applicants: Tucson Electric Power Company.

Description: 2nd Amended and Restated Participation Agreement Rev to be effective 4/17/2012.

Filed Date: 12/4/12.

Accession Number: 20121204–5000.

Comments Due: 5 p.m. ET 12/26/12.

Docket Numbers: ER13–506–000.

Applicants: Midwest Independent Transmission System Operator, Inc., Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc.

Description: SA 2493 MDU-Merricourt Power Partners FSA to be effective 11/30/2012.

Filed Date: 12/4/12.

Accession Number: 20121204–5025.

Comments Due: 5 p.m. ET 12/26/12.

Docket Numbers: ER13–507–000.

Applicants: Duke Energy Carolinas, LLC.

Description: Revised Rate Schedule No. 336 to be effective 1/1/2013.

Filed Date: 12/4/12.

Accession Number: 20121204–5026.

Comments Due: 5 p.m. ET 12/26/12.

Docket Numbers: ER13–508–000.

Applicants: Carolina Power & Light Company.

Description: Rate Schedule No. 196 of Carolina Power and Light Company to be effective 12/1/2012.

Filed Date: 12/4/12.

Accession Number: 20121204–5035.

Comments Due: 5 p.m. ET 12/26/12.

Docket Numbers: ER13–509–000.

Applicants: Carolina Power & Light Company.

Description: Carolina Power & Light Company submits Notice of Cancellation of Rate Schedule No. 96 with Virginia Electric and Power Company.

Filed Date: 12/4/12.

Accession Number: 20121204–5045.

Comments Due: 5 p.m. ET 12/26/12.

Docket Numbers: ER13–510–000.

Applicants: ISO New England Inc.

Description: ISO New England Inc. submits tariff filing per 35.13(a)(2)(iii: Corrections to Conform Tariff Language—Appendix A to be effective 4/17/2012.

Filed Date: 12/4/12.

Accession Number: 20121204–5046.

Comments Due: 5 p.m. ET 12/26/12.

Docket Numbers: ER13–511–000.

Applicants: Northern States Power Company, a Wisconsin corporation.

Description: Northern States Power Company, a Wisconsin Corporation submits tariff filing per 35.13(a)(2)(iii: 2012_12_4_NSPW DPC ACIF-Chief, Great North-135 to be effective 9/17/2012.

Filed Date: 12/4/12.

Accession Number: 20121204–5048.

Comments Due: 5 p.m. ET 12/26/12.

Docket Numbers: ER13–512–000.

Applicants: Wabash Valley Power Association, Inc.

Description: Wabash Valley Power Association, Inc. submits tariff filing per 35.13(a)(2)(iii: Amendment of Fulton County REMC Rate Schedule to be effective 2/4/2013.

Filed Date: 12/4/12.

Accession Number: 20121204–5051.

Comments Due: 5 p.m. ET 12/26/12.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf*. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 4, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–29831 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP07–34–000.

Applicants: PANHANDLE JOINT PARTIES, Southwest Gas Storage

Company, Panhandle Complainants, Panhandle Complainants v. Southwest Gas.

Description: Southwest Gas Storage Company submits its Semi-Annual Compliance Report, for the period May 1, 2012 through October 31, 2012.

Filed Date: 11/30/12.

Accession Number: 20121130–5066.

Comments Due: 5 p.m. ET 12/12/12.

Docket Numbers: RP07–541–000.

Applicants: Southwest Gas Storage Company.

Description: Southwest Gas Storage Company submits its Semi-Annual Compliance Report, for the period May 1, 2012 through October 31, 2012.

Filed Date: 11/30/12.

Accession Number: 20121130–5066.

Comments Due: 5 p.m. ET 12/12/12.

Docket Numbers: RP13–319–000.

Applicants: Gulf South Pipeline Company, LP.

Description: Cap Rel Neg Rate Agmt: HK 37367 to Sequent 40281 to be effective 12/1/2012.

Filed Date: 11/29/12.

Accession Number: 20121129–5020.

Comments Due: 5 p.m. ET 12/11/12.

Docket Numbers: RP13–320–000.

Applicants: Gulf South Pipeline Company, LP.

Description: Amendments to Neg Rate Agmts: QEP 36601–13 & 37657–27 to be effective 12/1/2012.

Filed Date: 11/29/12.

Accession Number: 20121129–5021.

Comments Due: 5 p.m. ET 12/11/12.

Docket Numbers: RP13–321–000.

Applicants: Gulf Crossing Pipeline Company LLC.

Description: Cap Rel Neg Rate Agmts: VanGuard 597 & 598 to Tenaska 715 & 716 to be effective 12/1/2012.

Filed Date: 11/29/12.

Accession Number: 20121129–5022.

Comments Due: 5 p.m. ET 12/11/12.

Docket Numbers: RP13–322–000.

Applicants: Algonquin Gas Transmission, LLC.

Description: Negotiated Rates Nov 2012 Cleanup to be effective 1/1/2013.

Filed Date: 11/29/12.

Accession Number: 20121129–5033.

Comments Due: 5 p.m. ET 12/11/12.

Docket Numbers: RP13–323–000.

Applicants: El Paso Natural Gas Company, L.L.C.

Description: Article 11.2(a) Inflation Adjustment Filing to be effective 1/1/2013.

Filed Date: 11/29/12.

Accession Number: 20121129–5050.

Comments Due: 5 p.m. ET 12/11/12.

Docket Numbers: RP13–324–000.

Applicants: Texas Eastern Transmission, LP.

Description: DTI 800317 Non-conforming Agreement to be effective 12/1/2012.

Filed Date: 11/29/12.

Accession Number: 20121129–5062.

Comments Due: 5 p.m. ET 12/11/12.

Docket Numbers: RP13–325–000.

Applicants: Natural Gas Pipeline Company of America.

Description: Contract Amendment to Rate Schedule X–50 to be effective 12/30/2012.

Filed Date: 11/29/12.

Accession Number: 20121129–5070.

Comments Due: 5 p.m. ET 12/11/12.

Docket Numbers: RP13–326–000.

Applicants: Rockies Express Pipeline LLC.

Description: Operating Company Name Change to Tallgrass to be effective 12/1/2012.

Filed Date: 11/29/12.

Accession Number: 20121129–5077.

Comments Due: 5 p.m. ET 12/11/12.

Docket Numbers: RP13–326–000.

Applicants: Rockies Express Pipeline LLC.

Description: Rockies Express Pipeline LLC submits corrected transmittal letter.

Filed Date: 11/30/12.

Accession Number: 20121130–5055.

Comments Due: 5 p.m. ET 12/12/12.

Docket Numbers: RP13–327–000.

Applicants: Southern Star Central Gas Pipeline, Inc.

Description: Southern Star Central Gas Pipeline, Inc. Annual Operational Flow Order Report.

Filed Date: 11/29/12.

Accession Number: 20121129–5128.

Comments Due: 5 p.m. ET 12/11/12.

Docket Numbers: RP13–328–000.

Applicants: Natural Gas Pipeline Company of America.

Description: Wisconsin Electric Amendment Filing to be effective 12/1/2012.

Filed Date: 11/29/12.

Accession Number: 20121129–5142.

Comments Due: 5 p.m. ET 12/11/12.

Docket Numbers: RP13–329–000.

Applicants: Empire Pipeline, Inc.

Description: Deferred State Income Tax Filing to be effective 12/1/2012.

Filed Date: 11/29/12.

Accession Number: 20121129–5155.

Comments Due: 5 p.m. ET 12/11/12.

Docket Numbers: RP13–330–000.

Applicants: East Cheyenne Gas Storage, LLC.

Description: Revised Form Exhibit to be effective 12/29/2012.

Filed Date: 11/29/12.

Accession Number: 20121129–5182.

Comments Due: 5 p.m. ET 12/11/12.

Docket Numbers: RP13–331–000.

Applicants: Gas Transmission Northwest LLC.

Description: Resetting Medford E–2 to be effective 1/1/2013.

Filed Date: 11/30/12.

Accession Number: 20121130–5049.

Comments Due: 5 p.m. ET 12/12/12.

Docket Numbers: RP13–332–000.

Applicants: Dominion Transmission, Inc.

Description: DTI—November 30, 2012 Negotiated Rate Agreements to be effective 12/1/2012.

Filed Date: 11/30/12.

Accession Number: 20121130–5065.

Comments Due: 5 p.m. ET 12/12/12.

Docket Numbers: RP13–333–000.

Applicants: Gas Transmission Northwest LLC.

Description: Gas Transmission Northwest LLC Annual Fuel Charge Adjustment Filing.

Filed Date: 11/30/12.

Accession Number: 20121130–5068.

Comments Due: 5 p.m. ET 12/12/12.

Docket Numbers: RP13–334–000.

Applicants: Columbia Gas Transmission, LLC.

Description: OTRA—Nov 2012 to be effective 1/1/2013.

Filed Date: 11/30/12.

Accession Number: 20121130–5085.

Comments Due: 5 p.m. ET 12/12/12.

Docket Numbers: RP13–335–000.

Applicants: National Fuel Gas Supply Corporation.

Description: TSCA for 2013 to be effective 1/1/2013.

Filed Date: 11/30/12.

Accession Number: 20121130–5088.

Comments Due: 5 p.m. ET 12/12/12.

Docket Numbers: RP13–336–000.

Applicants: Questar Pipeline Company.

Description: CHDP Zone Map Version 1.0.0 to be effective 1/1/2013.

Filed Date: 11/30/12.

Accession Number: 20121130–5095.

Comments Due: 5 p.m. ET 12/12/12.

Docket Numbers: RP13–337–000.

Applicants: Questar Southern Trails Pipeline Company.

Description: Statement of Negotiated Rates Version 3.0.0 to be effective 12/30/2012.

Filed Date: 11/30/12.

Accession Number: 20121130–5105.

Comments Due: 5 p.m. ET 12/12/12.

Docket Numbers: RP13–338–000.

Applicants: Southern Star Central Gas Pipeline, Inc.

Description: Southern Star Central Gas Pipeline, Inc. Annual Cash-Out Refund Report.

Filed Date: 11/30/12.

Accession Number: 20121130–5106.

Comments Due: 5 p.m. ET 12/12/12.

Docket Numbers: RP13–339–000.

Applicants: KPC Pipeline, LLC.

Description: Request for Waiver of Tariff Provision of KPC Pipeline, LLC.
Filed Date: 11/30/12.
Accession Number: 20121130–5107.
Comments Due: 5 p.m. ET 12/12/12.
Docket Numbers: RP13–340–000.
Applicants: Mojave Pipeline Company, LLC.
Description: Annual Fuel and L&U Filing effective 1/1/2013.
Filed Date: 11/30/12.
Accession Number: 20121130–5109.
Comments Due: 5 p.m. ET 12/12/12.
Docket Numbers: RP13–341–000.
Applicants: Florida Gas Transmission Company, LLC.
Description: Exhibit B Amendment to be effective 12/1/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5139.
Comments Due: 5 p.m. ET 12/12/12.
Docket Numbers: RP13–342–000.
Applicants: Southern Natural Gas Company, L.L.C.
Description: Annual Storage Cost Reconciliation Mechanism Report of Southern Natural Gas Company, L.L.C.
Filed Date: 11/30/12.
Accession Number: 20121130–5152.
Comments Due: 5 p.m. ET 12/12/12.
Docket Numbers: RP13–343–000.
Applicants: CenterPoint Energy Gas Transmission Comp.
Description: CEGT LLC—Sligo Lease LUFG Tracker Filing—2012 to be effective 1/1/2013.
Filed Date: 11/30/12.
Accession Number: 20121130–5156.
Comments Due: 5 p.m. ET 12/12/12.
Docket Numbers: RP13–344–000.
Applicants: Tennessee Gas Pipeline Company, L.L.C.
Description: Tennessee Gas Pipeline Company, L.L.C. 2011–2012 Cashout Report.
Filed Date: 11/30/12.
Accession Number: 20121130–5159.
Comments Due: 5 p.m. ET 12/12/12.
Docket Numbers: RP13–345–000.
Applicants: MarkWest Pioneer, L.L.C.
Description: MarkWest Pioneer, L.L.C. submits Quarterly Fuel Adjustment Filing.
Filed Date: 11/30/12.
Accession Number: 20121130–5160.
Comments Due: 5 p.m. ET 12/12/12.
Docket Numbers: RP13–346–000.
Applicants: Northern Natural Gas Company.
Description: 20121130 Negotiated Rate to be effective 12/1/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5182.
Comments Due: 5 p.m. ET 12/12/12.
Docket Numbers: RP13–347–000.
Applicants: Questar Pipeline Company.
Description: Questar Pipeline Company submits tariff filing per 154.204: FGRP for 2013 to be effective 1/1/2013.
Filed Date: 11/30/12.
Accession Number: 20121130–5189.
Comments Due: 5 p.m. ET 12/12/12.
Docket Numbers: RP13–348–000.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: El Paso Natural Gas Company, L.L.C. submits tariff filing per 154.403(d)(2): Annual FL&U Filing effective 1/1/2013.
Filed Date: 11/30/12.
Accession Number: 20121130–5338.
Comments Due: 5 p.m. ET 12/12/12.
Docket Numbers: RP13–349–000.
Applicants: Kern River Gas Transmission Company.
Description: Kern River Gas Transmission Company submits tariff filing per 154.204: 2013 Non-leap Year Rates to be effective 1/1/2013.
Filed Date: 11/30/12.
Accession Number: 20121130–5340.
Comments Due: 5 p.m. ET 12/12/12.
Docket Numbers: RP13–350–000.
Applicants: Ruby Pipeline, L.L.C.
Description: Ruby Pipeline, L.L.C. submits tariff filing per 154.403(d)(2): FL&U and EPC Filing effective 1/1/2013.
Filed Date: 11/30/12.
Accession Number: 20121130–5346.
Comments Due: 5 p.m. ET 12/12/12.
Docket Numbers: RP13–351–000.
Applicants: Transcontinental Gas Pipe Line Company.
Description: Transcontinental Gas Pipe Line Company, LLC submits tariff filing per 154.403: S–2 Tracker Filing Effective 12/1/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5349.
Comments Due: 5 p.m. ET 12/12/12.
Docket Numbers: RP13–352–000.
Applicants: Big Sandy Pipeline, LLC.
Description: Big Sandy Pipeline, LLC submits tariff filing per 154.204: Negotiated Rates for Hayden Harper to be effective 12/1/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5371.
Comments Due: 5 p.m. ET 12/12/12.
Docket Numbers: RP13–353–000.
Applicants: Colorado Interstate Gas Company, L.L.C.
Description: Colorado Interstate Gas Company, L.L.C. submits tariff filing per 154.403(d)(2): Quarterly FL&U Filing effective 1/1/2013.
Filed Date: 11/30/12.
Accession Number: 20121130–5377.
Comments Due: 5 p.m. ET 12/12/12.
Docket Numbers: RP13–354–000.
Applicants: Rockies Express Pipeline LLC.
Description: Rockies Express Pipeline LLC submits tariff filing per 154.204: Neg Rate 2012–11–30 WIC, Oxy (Perm Release etc.) to be effective 12/1/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5387.
Comments Due: 5 p.m. ET 12/12/12.
Docket Numbers: RP13–355–000.
Applicants: Alliance Pipeline L.P.
Description: Alliance Pipeline L.P. submits tariff filing per 154.204: 2013 Rate Filing to be effective 1/1/2013.
Filed Date: 11/30/12.
Accession Number: 20121130–5388.
Comments Due: 5 p.m. ET 12/12/12.
Docket Numbers: RP13–356–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: Iroquois Gas Transmission System, L.P. submits tariff filing per 154.204: 11/30/12 HUB Negotiated Rates Blanket Filing 3 to be effective 12/1/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5396.
Comments Due: 5 p.m. ET 12/12/12.
Docket Numbers: RP13–357–000.
Applicants: East Cheyenne Gas Storage, LLC.
Description: East Cheyenne Gas Storage, LLC submits tariff filing per 154.204: ECGS Nov 30, 2012 Non-Conforming Agreements Filing to be effective 12/31/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5400.
Comments Due: 5 p.m. ET 12/12/12.
Docket Numbers: RP13–358–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: Iroquois Gas Transmission System, L.P. submits tariff filing per 154.204: 11/30/12 Negotiatied Rates—Citigroup Energy (RTS) Amend 1 to be effective 12/1/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5403.
Comments Due: 5 p.m. ET 12/12/12.
Docket Numbers: RP13–359–000.
Applicants: Fayetteville Express Pipeline LLC.
Description: Fayetteville Express Pipeline LLC submits tariff filing per 154.203: FEP 2012 NAESB Filing—Compliance with 11/16/12 Order to be effective 12/1/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5405.
Comments Due: 5 p.m. ET 12/12/12.
Docket Numbers: RP13–360–000.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: El Paso Natural Gas Company, L.L.C. submits tariff filing per 154.204: Non-Conforming TSA Filing to be effective 1/1/2013.
Filed Date: 11/30/12.

Accession Number: 20121130–5409.
Comments Due: 5 p.m. ET 12/12/12.

Docket Numbers: RP13–361–000.
Applicants: Gulf South Pipeline Company, LP.
Description: Gulf South Pipeline Company, LP submits tariff filing per 154.204: Devon 34694–43 Amendment to Neg Rate Agmt filing to be effective 12/7/2012.
Filed Date: 12/3/12.
Accession Number: 20121203–5023.
Comments Due: 5 p.m. ET 12/17/12.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP12–1114–001.
Applicants: Kern River Gas Transmission Company.
Description: 2012 NAESB 2.0 Compliance Filing to be effective 12/1/2012.
Filed Date: 11/29/12.
Accession Number: 20121129–5154.
Comments Due: 5 p.m. ET 12/11/12.

Docket Numbers: RP13–117–001.
Applicants: Columbia Gas Transmission, LLC.
Description: NAESB 2.0 Compliance Filing to be effective 12/1/2012.
Filed Date: 11/29/12.
Accession Number: 20121129–5052.
Comments Due: 5 p.m. ET 12/11/12.

Docket Numbers: RP13–117–002.
Applicants: Columbia Gas Transmission, LLC.
Description: NAESB Req. Extension of Time 5.4.16 to be effective 12/1/2012.
Filed Date: 11/29/12.
Accession Number: 20121129–5180.
Comments Due: 5 p.m. ET 12/11/12.

Docket Numbers: RP13–118–001.
Applicants: Columbia Gulf Transmission Company.
Description: NAESB 2.0 Compliance Filing to be effective 12/1/2012.
Filed Date: 11/29/12.
Accession Number: 20121129–5064.
Comments Due: 5 p.m. ET 12/11/12.

Docket Numbers: RP13–118–002.
Applicants: Columbia Gulf Transmission Company.
Description: NAESB 2.0 Extension of Time of 5.4.16 to be effective 12/1/2012.
Filed Date: 11/29/12.
Accession Number: 20121129–5178.
Comments Due: 5 p.m. ET 12/11/12.

Docket Numbers: RP13–121–002.
Applicants: Crossroads Pipeline Company.
Description: NAESB 2.0 Req. Extension of Time 5.4.16 to be effective 12/1/2012.
Filed Date: 11/29/12.
Accession Number: 20121129–5177.
Comments Due: 5 p.m. ET 12/11/12.

Docket Numbers: RP13–122–001.
Applicants: Central Kentucky Transmission Company.
Description: NAESB 2.0 Req. Extension of Time 5.4.16 to be effective 12/1/2012.
Filed Date: 11/29/12.
Accession Number: 20121129–5181.
Comments Due: 5 p.m. ET 12/11/12.

Docket Numbers: RP13–124–001.
Applicants: Hardy Storage Company, LLC.
Description: NAESB 2.0 Req. Extension of Time 5.4.16 to be effective 12/1/2012.
Filed Date: 11/29/12.
Accession Number: 20121129–5176.
Comments Due: 5 p.m. ET 12/11/12.

Docket Numbers: RP13–208–001.
Applicants: Gulf South Pipeline Company, LP.
Description: Compliance filing in Docket No. RP13–208–000 to be effective 12/1/2012.
Filed Date: 11/29/12.
Accession Number: 20121129–5076.
Comments Due: 5 p.m. ET 12/11/12.

Docket Numbers: RP12–1091–001.
Applicants: Tallgrass Interstate Gas Transmission, L.
Description: NAESB 2.0 Compliance to Original Filing to be effective 12/1/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5004.
Comments Due: 5 p.m. ET 12/12/12.

Docket Numbers: RP12–1116–001.
Applicants: Transwestern Pipeline Company, LLC.
Description: Transwestern Pipeline Company, LLC submits tariff filing per 154.203: 2012 TW NAESB 2.0 Compliance with Order Filing to be effective 12/1/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5383.
Comments Due: 5 p.m. ET 12/12/12.

Docket Numbers: RP13–10–001.
Applicants: Gulf Crossing Pipeline Company LLC.
Description: Compliance filing in Docket No. RP13–10–000 to be effective 12/1/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5077.
Comments Due: 5 p.m. ET 12/12/12.

Docket Numbers: RP13–120–001.
Applicants: Millennium Pipeline Company, LLC.
Description: Millennium Pipeline Company, LLC submits tariff filing per 154.203: NAESB 2.0 Compliance to be effective 12/1/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5339.
Comments Due: 5 p.m. ET 12/12/12.

Docket Numbers: RP13–120–002.
Applicants: Millennium Pipeline Company, LLC.
Description: Millennium Pipeline Company, LLC submits tariff filing per 154.203: NAESB 2.0 Request for Extension of Time to be effective 12/1/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5386.
Comments Due: 5 p.m. ET 12/12/12.

Docket Numbers: RP13–125–001.
Applicants: Northwest Pipeline GP.
Description: Northwest Pipeline GP submits tariff filing per 154.203: RP13–125–001 Avista Non-Conforming Compliance Filing to be effective 11/2/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5341.
Comments Due: 5 p.m. ET 12/12/12.

Docket Numbers: RP13–24–001.
Applicants: Southern Natural Gas Company, L.L.C.
Description: Order No. 587–V Compliance Filing Compliance to be effective 12/1/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5070.
Comments Due: 5 p.m. ET 12/12/12.

Docket Numbers: RP13–25–001.
Applicants: Southern LNG Company, L.L.C.
Description: Order No. 587–V Compliance Filing Compliance to be effective 12/1/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5071.
Comments Due: 5 p.m. ET 12/12/12.

Docket Numbers: RP13–55–001.
Applicants: Elba Express Company, L.L.C.
Description: Order No. 587–V Compliance Filing Compliance to be effective 12/1/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5072.
Comments Due: 5 p.m. ET 12/12/12.

Docket Numbers: RP13–85–001.
Applicants: White River Hub, LLC.
Description: White River Hub, LLC Compliance Filing—Order 587–V/NAESB 2.0 to be effective 12/1/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5104.
Comments Due: 5 p.m. ET 12/12/12.

Docket Numbers: RP13–89–001.
Applicants: Questar Overthrust Pipeline Company.
Description: Order 587–V NAESB 2.0 Compliance Filing, Revised Section 28 to be effective 12/1/2012.

Filed Date: 11/30/12.
Accession Number: 20121130–5103.
Comments Due: 5 p.m. ET 12/12/12.
Docket Numbers: RP13–95–001.
Applicants: Wyoming Interstate Company, L.L.C.
Description: Order No. 587–V Compliance to be effective 12/1/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5180.
Comments Due: 5 p.m. ET 12/12/12.
Docket Numbers: RP12–1089–001.
Applicants: Trailblazer Pipeline Company LLC.
Description: Trailblazer Pipeline Company LLC submits tariff filing per 154.203: NAESB 2.0 Compliance Filing to be effective 12/1/2012.
Filed Date: 12/3/12.
Accession Number: 20121203–5002.
Comments Due: 5 p.m. ET 12/17/12.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, and service can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 3, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–29832 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC13–49–000.
Applicants: Central Maine Power Company, Maine Electric Power Company.
Description: Application for Authorization Under Section 203(a)91)(A) of (B) of the Federal Power Act and Request for Waivers and Expedited Action of Central Maine Power Company and Maine Public Service Company.
Filed Date: 11/30/12.
Accession Number: 20121130–5475.
Comments Due: 5 p.m. ET 12/21/12.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1782–000.
Applicants: Tampa Electric Company.
Description: Tampa Electric Company submits tariff filing per 35.19a(b): Compliance Refund Report to be effective N/A.
Filed Date: 11/30/12.
Accession Number: 20121130–5410.
Comments Due: 5 p.m. ET 12/21/12.
Docket Numbers: ER10–2985–008; ER10–3049–009; ER10–3051–009.
Applicants: Champion Energy Marketing LLC, Champion Energy Services, LLC, Champion Energy, LLC.
Description: Notice of Non-Material Change in Status of Champion Energy Marketing LLC, et al.
Filed Date: 12/3/12.
Accession Number: 20121203–5071.
Comments Due: 5 p.m. ET 12/24/12.
Docket Numbers: ER12–953–001.
Applicants: ISO New England Inc.
Description: ISO New England Inc. submits tariff filing per 35: FCM Compliance Filing to be effective 2/12/2013.
Filed Date: 12/3/12.
Accession Number: 20121203–5028.
Comments Due: 5 p.m. ET 12/24/12.
Docket Numbers: ER12–1753–001.
Applicants: Wyoming Colorado Intertie, LLC.
Description: Wyoming Colorado Intertie, LLC submits tariff filing per 35: Revised Wyoming Wind and Power Transmission Service Agreement to be effective 7/9/2012.
Filed Date: 12/3/12.
Accession Number: 20121203–5060.
Comments Due: 5 p.m. ET 12/24/12.
Docket Numbers: ER12–2277–002.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.17(b): G631–2–3 to be effective 7/21/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5357.
Comments Due: 5 p.m. ET 12/21/12.
Docket Numbers: ER12–2525–001.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc. submits tariff filing per 35.17(b): Response to Deficiency Letter—ER12–2525–000 to be effective 11/1/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5401.
Comments Due: 5 p.m. ET 12/21/12.
Docket Numbers: ER12–2568–002.
Applicants: New York Independent System Operator, Inc.
Description: New York Independent System Operator, Inc. submits tariff filing per 35: NYISO Compliance Filing of Services Tariff Rate Schedule Black Start Provisions to be effective 11/1/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5395.
Comments Due: 5 p.m. ET 12/21/12.
Docket Numbers: ER12–2654–005.
Applicants: Netsales & Arts, Inc.
Description: Netsales & Arts, Inc. submits tariff filing per 35.17(b): mbr_tar to be effective 9/30/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5398.
Comments Due: 5 p.m. ET 12/21/12.
Docket Numbers: ER13–486–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Revisions to the PJM OATT Attachment DD.2 re DR Targets to be effective 1/31/2013.
Filed Date: 11/30/12.
Accession Number: 20121130–5397.
Comments Due: 5 p.m. ET 12/21/12.
Docket Numbers: ER13–487–000.
Applicants: Dogwood Energy LLC.
Description: Dogwood Energy LLC submits tariff filing per 35.13(a)(2)(iii: Category 1 Filing for the Southwest Power Pool Region to be effective 8/30/2010.
Filed Date: 11/30/12.
Accession Number: 20121130–5399.
Comments Due: 5 p.m. ET 12/21/12.
Docket Numbers: ER13–488–000.
Applicants: EP Rock Springs, LLC, PJM Interconnection, L.L.C.
Description: EP Rock Springs, LLC submits tariff filing per 35.13(a)(2)(iii: EP Rock Springs files New PJM OATT Attachment H–23 to be effective 2/1/2013.
Filed Date: 11/30/12.
Accession Number: 20121130–5402.
Comments Due: 5 p.m. ET 12/21/12.
Docket Numbers: ER13–489–000.
Applicants: Black Hills Power, Inc.
Description: Black Hills Power, Inc. submits tariff filing per 35.13(a)(2)(iii: GDEMA Revised Schedule B to be effective 12/1/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5404.
Comments Due: 5 p.m. ET 12/21/12.
Docket Numbers: ER13–490–000.
Applicants: Black Hills Power, Inc.
Description: Black Hills Power, Inc. submits tariff filing per 35.13(a)(2)(iii: GDEMA Revised Schedule B to be effective 12/1/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5406.
Comments Due: 5 p.m. ET 12/21/12.

Docket Numbers: ER13–491–000.
Applicants: Black Hills Power, Inc.
Description: Black Hills Power, Inc. submits tariff filing per 35.13(a)(2)(iii: GDEMA Revised Schedule B to be effective 12/1/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5407.
Comments Due: 5 p.m. ET 12/21/12.
Docket Numbers: ER13–492–000.
Applicants: Black Hills Power, Inc.
Description: Black Hills Power, Inc. submits tariff filing per 35.13(a)(2)(iii: GDEMA Revised Schedule B to be effective 12/1/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5408.
Comments Due: 5 p.m. ET 12/21/12.
Docket Numbers: ER13–493–000.
Applicants: New England Power Pool Participants Committee.
Description: New England Power Pool Participants Committee submits tariff filing per 35.13(a)(2)(iii: Dec 2012 Membership Filing to be effective 11/1/2012.
Filed Date: 12/3/12.
Accession Number: 20121203–5001.
Comments Due: 5 p.m. ET 12/24/12.
Docket Numbers: ER13–494–000.
Applicants: Pacific Gas and Electric Company.
Description: Pacific Gas and Electric Company submits tariff filing per 35.13(a)(2)(iii: Amendment to WD Tariff: Generator Interconnection Procedures to be effective 12/4/2012.
Filed Date: 12/3/12.
Accession Number: 20121203–5003.
Comments Due: 5 p.m. ET 12/24/12.
Docket Numbers: ER13–495–000.
Applicants: ISO New England Inc., New England Power Pool.
Description: ISO–NE and NEPOOL Filing of ICR, HQICCS and Related Values for 2013/2014, 2014/2015, and 2015/2016 Annual Reconfiguration Auctions.
Filed Date: 11/30/12.
Accession Number: 20121130–5460.
Comments Due: 5 p.m. ET 12/21/12.
Docket Numbers: ER13–496–000.
Applicants: Public Service Company of Colorado.
Description: Public Service Company of Colorado submits tariff filing per 35.13(a)(2)(iii: 2012–12–3–PSCo–TSGT–NOA 328 to be effective 7/1/2012.
Filed Date: 12/3/12.
Accession Number: 20121203–5026.
Comments Due: 5 p.m. ET 12/24/12.
Docket Numbers: ER13–497–000.
Applicants: Southern California Edison Company.
Description: Southern California Edison Company submits tariff filing per 35.13(a)(2)(iii: SGIA and Distribution Service Agreement RE Columbia 3 LLC to be effective 12/4/2012.
Filed Date: 12/3/12.
Accession Number: 20121203–5052.
Comments Due: 5 p.m. ET 12/24/12.
Docket Numbers: ER13–498–000
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc. submits tariff filing per 35.13(a)(2)(iii: 2198R4 Kansas Power Pool NITSA NOA to be effective 11/1/2012.
Filed Date: 12/3/12.
Accession Number: 20121203–5058.
Comments Due: 5 p.m. ET 12/24/12.
Docket Numbers: ER13–499–000.
Applicants: Tenaska Washington Partners, L.P.
Description: Tenaska Washington Partners, L.P. submits tariff filing per 35.15: Notice of Cancellation to be effective 12/4/2012.
Filed Date: 12/3/12.
Accession Number: 20121203–5059.
Comments Due: 5 p.m. ET 12/24/12.
Docket Numbers: ER13–500–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Original Service Agreement No. 3441; Queue No. X2–099 to be effective 11/7/2012.
Filed Date: 12/3/12.
Accession Number: 20121203–5115.
Comments Due: 5 p.m. ET 12/24/12.
Docket Numbers: ER13–501–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Original Service Agreement No. 3442; Queue No. X1–114 to be effective 11/8/2012.
Filed Date: 12/3/12.
Accession Number: 20121203–5117.
Comments Due: 5 p.m. ET 12/24/12.
Docket Numbers: ER13–502–000.
Applicants: Lively Grove Energy Partners, LLC.
Description: Lively Grove Energy Partners, LLC submits tariff filing per 35.15: Notice of Cancellation of Reactive Power Rate Schedule v 1.0.0 to be effective 12/1/2012.
Filed Date: 12/3/12.
Accession Number: 20121203–5120.
Comments Due: 5 p.m. ET 12/24/12.
Docket Numbers: ER13–503–000.
Applicants: Westar Energy, Inc.
Description: Westar Energy, Inc. submits tariff filing per 35.13(a)(2)(iii: KEPCo, Revs to Attachment A—Delivery Points (02/01/13) to be effective 2/1/2013.
Filed Date: 12/3/12.
Accession Number: 20121203–5144.
Comments Due: 5 p.m. ET 12/24/12.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 3, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–29830 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP13–362–000.
Applicants: Equitrans, L.P.
Description: Negotiated Rate Service Agreement—Rice Drilling B LLC to be effective 12/1/2012.
Filed Date: 12/3/12.
Accession Number: 20121203–5041.
Comments Due: 5 p.m. ET 12/17/12.
Docket Numbers: RP13–363–000.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: MGI Non-Conforming TSAs Filing to be effective 1/1/2013.
Filed Date: 11/30/12.
Accession Number: 20121130–5476.
Comments Due: 5 p.m. ET 12/12/12.
Docket Numbers: RP13–364–000.
Applicants: Gulf South Pipeline Company, LP.
Description: Filing to Incorporate Approved Tariff Changes (RP13–208 & RP13–265) to be effective 12/1/2012.
Filed Date: 12/3/12.
Accession Number: 20121203–5077.
Comments Due: 5 p.m. ET 12/17/12.

Docket Numbers: RP13–365–000.
Applicants: TC Offshore LLC.
Description: Non-Conforming Agreements to be effective 12/3/2012.
Filed Date: 12/3/12.
Accession Number: 20121203–5099.
Comments Due: 5 p.m. ET 12/17/12.

Docket Numbers: RP13–366–000.
Applicants: Eastern Shore Natural Gas Company.
Description: Storage Tracker Filing to be effective 11/1/2012.
Filed Date: 12/3/12.
Accession Number: 20121203–5110.
Comments Due: 5 p.m. ET 12/17/12.

Docket Numbers: RP13–367–000.
Applicants: CenterPoint Energy Gas Transmission Comp.
Description: CEGT LLC—December 2012 Negotiated Rate Filing to be effective 12/1/2012.
Filed Date: 12/3/12.
Accession Number: 20121203–5119.
Comments Due: 5 p.m. ET 12/17/12.

Docket Numbers: RP13–368–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: Iroquois Gas Transmission System, L.P. submits tariff filing per 154.204: 12/03/12 Negotiated Rates—ConocoPhillips Company (RTS) Amend 1 to be effective 12/3/2012.
Filed Date: 12/3/12.
Accession Number: 20121203–5164.
Comments Due: 5 p.m. ET 12/17/12.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP12–1125–001.
Applicants: Gulf States Transmission LLC.
Description: Gulf States Transmission NAESB 2.0 Compliance with Order Filing to be effective 12/1/2012.
Filed Date: 12/3/12.
Accession Number: 20121203–5108.
Comments Due: 5 p.m. ET 12/17/12.

Docket Numbers: RP12–818–001.
Applicants: Crossroads Pipeline Company.
Description: Non-Conforming Agreement—NIPSCO—Compliance Filing to be effective 11/1/2012.
Filed Date: 12/3/12.
Accession Number: 20121203–5135.
Comments Due: 5 p.m. ET 12/17/12.

Docket Numbers: RP13–260–001.
Applicants: High Point Gas Transmission, LLC.
Description: Compliance NAESB Resubmittal Filing to be effective 12/1/2012.
Filed Date: 12/3/12.
Accession Number: 20121203–5055.
Comments Due: 5 p.m. ET 12/17/12.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, and service can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf*. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 4, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–29829 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Commission Staff Attendance

The Federal Energy Regulatory Commission (Commission) hereby gives notice that members of the Commission's staff may attend the following meeting related to the transmission planning activities of the Southern Company Services, Inc.:

Southeastern Regional Transmission Planning Process (SERTP) Interim Stakeholders' Meeting on Order No. 1000

December 12, 2012, 9:00 a.m.–3:00 p.m., Local Time

The above-referenced meeting will be held at:

Georgia Transmission Corporation (GTC) Headquarters—Tucker, Georgia

The above-referenced meeting is open to stakeholders.

Further information may be found at: *www.southeasternrtp.com.*

The discussions at the meeting described above may address matters at issue in the following proceedings:

Docket No. ER12–337, *Mississippi Power Company*

For more information, contact Valerie Martin, Office of Energy Market Regulation, Federal Energy Regulatory Commission at (202) 502–6139 or *Valerie.Martin@ferc.gov.*

Dated: December 5, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–29850 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Commission Staff Attendance

The Federal Energy Regulatory Commission hereby gives notice that members of the Commission's staff may attend the following meetings related to the transmission planning activities of the Midwest Independent Transmission System Operator, Inc. (MISO):

MISO–PJM Order 1000 Interregional Coordination Workshop—December 5, 2012.

MISO–SPP Order 1000 Interregional Coordination Workshop—December 17, 2012.

The above-referenced meeting will be held at: MISO Headquarters, 720 City Center Drive, Carmel, IN 46032.

The above-referenced meeting is open to the public.

Further information may be found at *www.misoenergy.org.*

The discussions at the meeting described above may address matters at issue in the following proceedings:

Docket No. ER10–1791, Midwest Independent Transmission System Operator, Inc.
Docket No. ER10–1997, Midwest Independent Transmission System Operator, Inc.
Docket No. ER11–1844, Midwest Independent Transmission System Operator, Inc.
Docket No. ER11–2700, Midwest Independent Transmission System Operator, Inc.
Docket No. ER11–4081, Midwest Independent Transmission System Operator, Inc.
Docket No. ER11–4514, Midwest Independent Transmission System Operator, Inc.
Docket No. ER11–2777, Midwest Independent Transmission System Operator, Inc. and Ameren Illinois Company

Docket No. ER12–309—Midwest Independent Transmission System Operator, Inc.
Docket No. ER12–427, Midwest Independent Transmission System Operator, Inc.
Docket No. ER12–480, Midwest Independent Transmission System Operator, Inc.
Docket No. ER12–678, Midwest Independent Transmission System Operator, Inc.
Docket No. ER12–715, Midwest Independent Transmission System Operator, Inc.
Docket No. ER12–747, Midwest Independent Transmission System Operator, Inc.
Docket No. ER12–1265, Midwest Independent Transmission System Operator, Inc.
Docket No. ER12–1266, Midwest Independent Transmission System Operator, Inc.
Docket No. ER12–1586, Southwest Power Pool, Inc.
Docket No. ER12–1835, Midwest Independent Transmission System Operator, Inc.
Docket No. ER12–1928, Midwest Independent Transmission System Operator, Inc.
Docket No. ER12–2682, Midwest Independent Transmission System Operator, Inc.
Docket No. ER13–37, Midwest Independent Transmission System Operator, Inc.
Docket No. ER13–38, Midwest Independent Transmission System Operator, Inc.
Docket No. ER13–89, MidAmerican Energy Company and Midwest Independent Transmission System Operator, Inc.
Docket No. ER13–101, American Transmission Company LLC and Midwest Independent Transmission System Operator, Inc.
Docket No. ER13–186, Midwest Independent Transmission System Operator, Inc.
Docket No. ER13–187, Midwest Independent Transmission System Operator, Inc.
Docket No. EL11–30, E.ON Climate & Renewables North America, LLC v. Midwest Independent Transmission System Operator, Inc.
Docket No. EL11–34, Midwest Independent Transmission System Operator, Inc.
Docket No. EL11–53, Shetek Wind Inc., Jeffers South LLC and Allco Renewable Energy Limited v. Midwest Independent Transmission System Operator, Inc.
Docket No. EL11–56, FirstEnergy Service Company v. Midwest Independent Transmission System Operator, Inc.
Docket No. EL12–24, Pioneer Transmission LLC v. Midwest Independent Transmission System Operator, Inc.
Docket No. EL12–28, Xcel Energy Services Inc. v. American Transmission Company, LLC
Docket No. EL12–35, Midwest Independent Transmission System Operator, Inc.
Docket No. EL13–9, American Transmission Company v. Midwest Independent Transmission System Operator, Inc. and Xcel Energy Services, Inc.
Docket No. OA08–53, Midwest Independent Transmission System Operator, Inc.

For more information, contact Jason Strong, Office of Energy Markets Regulation, Federal Energy Regulatory Commission at (202) 502–6124 or *jason.strong@ferc.gov.*

Dated: December 3, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–29796 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP13–313–000]

Essar Steel Minnesota, LLC v. Great Lakes Gas Transmission Limited Partnership; Notice of Complaint

Take notice that on November 27, 2012, pursuant to Rule 206 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission), 18 CFR 385.206 (2012); and section 5 of the Natural Gas Act, 15 U.S.C. 717(a), Essar Steel Minnesota, LLC (Complainant) filed a formal complaint against Great Lakes Gas Transmission Limited Partnership (Respondent), alleging that the Respondent has failed to comply with the provisions of its tariff in dealing with non-payment by the Complainant under a firm transportation service agreement and has taken actions that are unjust and unreasonable and in violation of the Respondent's transmission tariff and the Natural Gas Act.

The Complainant certifies that copies of the complaint were served on the contacts for the Respondent as listed on the Commission's list of Corporate Officials.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on December 17, 2012.

Dated: November 28, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–29805 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. EG12–108–000, et al.]

Notice of Effectiveness of Exempt Wholesale Generator or Foreign Utility Company Status

	Docket Nos.
Prairie Rose Wind, LLC	EG12–108–000
Prairie Rose Transmission, LLC	EG12–109–000
Crawfordsville Energy, LLC	EG12–110–000
Catalina Solar, LLC	EG12–111–000
Ocotillo Express LLC	EG12–112–000
Groton Wind, LLC	EG12–113–000
New England Wind, LLC	EG12–114–000
Penascal II Wind Project, LLC	EG12–115–000
Enbridge Wind Power General Partnership	FC12–8–000
Greenwich Windfarm, LP	FC12–9–000
Enbridge Renewable Energy Infrastructure Limited Partnership	FC12–10–000
Project AMBG2 LP	FC12–11–000
SunBridge Wind Power Project	FC12–12–000
Talbot Windfarm, LP	FC12–13–000
Tilbury Solar Project LP	FC12–14–000
Enbridge Lac-Alfred Wind Project Limited Partnership	FC12–15–000

Take notice that during the month of November 2012, the status of the above-captioned entities as Exempt Wholesale Generators or Foreign Utility Companies became effective by operation of the Commission's regulations. 18 CFR 366.7(a).

Dated: December 5, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–29847 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP12–501–000]

Florida Gas Transmission Company, LLC; Notice of Availability of the Environmental Assessment for the Proposed I–595 Replacement Project

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared an environmental assessment (EA) for the I–595 Replacement Project, proposed by the Florida Gas Transmission Company, LLC (FGT) in the above-referenced docket. FGT is requesting authorization to abandon in place approximately 1,618 feet of existing, 36-inch-diameter natural gas transmission pipeline located along the east side of the Florida Turnpike (State Road 91) near the Interstate-595 interchange in Broward County, Florida; and replace this pipe with approximately 2,261 feet of new, 36-inch-diameter natural gas transmission pipeline to be located east of the existing pipe, partially within existing utility rights-of-way and entirely across previously disturbed/developed lands.

The EA assesses the potential environmental effects of the abandonment, construction and operation of the I–595 Replacement Project in accordance with the requirements of the National Environmental Policy Act (NEPA). The FERC staff concludes that approval of the proposed project, with appropriate mitigating measures, would not constitute a major federal action significantly affecting the quality of the human environment.

The FERC staff mailed copies of the EA to federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American tribes; potentially affected landowners and other interested individuals and groups; and parties to this proceeding. In addition, the EA is available for public viewing on the FERC's Web site (*www.ferc.gov*) using the eLibrary link. A limited number of copies of the EA are available for distribution and public inspection at: Federal Energy Regulatory Commission, Public Reference Room, 888 First Street NE., Room 2A, Washington, DC 20426, (202) 502–8371.

Any person wishing to comment on the EA may do so. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that the Commission has the opportunity to consider your comments prior to making its decision on this project, it is important that we receive your comments in Washington, DC on or before December 31, 2012.

For your convenience, there are three methods you can use to file your comments to the Commission. In all instances, please reference the project docket number (CP12–501–000) with your submission. The Commission encourages electronic filing of comments and has expert staff available to assist you at (202) 502–8258 or *efiling@ferc.gov*.

(1) You can file your comments electronically using the eComment feature on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. This is an easy method for submitting brief, text-only comments on a project;

(2) You can also file your comments electronically using the eFiling feature on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You must select the type of filing you are making. If you are filing a comment on a particular project, please select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

Any person seeking to become a party to the proceeding must file a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedures (18 CFR 385.214).[1] Only intervenors have the right to seek rehearing of the Commission's decision. The Commission grants affected landowners and others with environmental concerns intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which no other party can adequately represent. Simply filing environmental comments will not give you intervenor status, but

[1] See the previous discussion on the methods for filing comments.

you do not need intervenor status to have your comments considered.

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC Web site (*www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search,'' and enter the docket number excluding the last three digits in the Docket Number field (i.e., CP12–501). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/esubscribenow.htm*.

Dated: November 30, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–29810 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 1175–015 and 1290–012]

Appalachian Power Company; Notice of Availability of Environmental Assessment

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's regulations, 18 CFR Part 380 (Order No. 486, 52 FR 47897), the Office of Energy Projects has reviewed the application for a new license for the 28.8-megawatt (MW) London-Marmet Hydroelectric Project and the 14.76–MW Winfield Hydroelectric Project located on the Kanawha River in Fayette, Kanawha, and Putnam Counties, West Virginia, and has prepared an Environmental Assessment (EA). In the EA, Commission staff analyzes the potential environmental effects of relicensing the projects and concludes that issuing new licenses for the projects, with appropriate environmental measures, would not constitute a major federal action significantly affecting the quality of the human environment.

A copy of the EA is on file with the Commission and is available for public inspection. The EA may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Comments on the EA should be filed within 30 days from the date of this notice. Comments may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. Please affix ''London-Marmet Hydroelectric Project No. 1175–015 and/or Winfield Hydroelectric Project No. 1290–012'' to all comments.

For further information, contact Brandi Sangunett at (202) 502–8393.

Dated: December 4, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–29797 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2696–033–NY]

Town of Stuyvesant, NY; Albany Engineering Corporation; Notice of Availability of Final Environmental Assessment

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's regulations, 18 CFR Part 380 (Order No. 486, 52 FR 47897), the Office of Energy Projects has reviewed the application for a new license for the 4,320-kilowatt (kW) Stuyvesant Falls Hydroelectric Project located on Kinderhook Creek in Columbia County, New York, and prepared a final Environmental Assessment (final EA). In the final EA, Commission staff analyzes the potential environmental effects of relicensing the project and concludes that issuing a new license for the project, with appropriate environmental measures, would not constitute a major federal action significantly affecting the quality of the human environment.

A copy of the final EA is on file with the Commission and is available for public inspection. The final EA may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, (202) 502–8659.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

For further information, contact Andy Bernick at (202) 502–8660.

Dated: December 5, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–29846 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP12–19–000; CP12–20–000]

Dominion Transmission Inc.; Notice of Availability of the Environmental Assessment for the Proposed Tioga Area Expansion and Sabinsville to Morrisville Projects

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared an environmental assessment (EA) for the Tioga Area Expansion and Sabinsville to Morrisville Projects, proposed by Dominion Transmission Inc. (DTI) in the above-referenced dockets. DTI requests authorization to construct and operate natural gas pipelines and aboveground facilities in Pennsylvania and New York.

The EA assesses the potential environmental effects of the construction and operation of the Tioga Area Expansion and Sabinsville to Morrisville Projects, in accordance with the requirements of the National Environmental Policy Act (NEPA). The FERC staff concludes that approval of the proposed projects, with appropriate mitigating measures, would not constitute a major federal action significantly affecting the quality of the human environment.

The U.S. Army Corps of Engineers—Baltimore District (COE) participated as a cooperating agency in the preparation of the EA. Cooperating agencies have jurisdiction by law or special expertise with respect to resources potentially affected by the proposal and participate in the NEPA analysis. The COE can adopt the EA for its NEPA requirements when considering issuing permits for the projects under the Clean Water Act.

The proposed Tioga Area Expansion Project in Docket No. CP12–19–000 includes:

- Installation of about 15 miles of new 24-inch-diameter pipeline (TL–610–Extension 1), associated with a new valve at DTI's existing Elk Run Gate, a new pig launcher and receiver, and the removal of about 4.7 miles of DTI's previously abandoned 16-inch-diameter pipeline (LN–280) in Tioga County, Pennsylvania;
- Installation of about 800 feet of new 24-inch-diameter pipeline (TL–614) in Potter County, Pennsylvania;
- Installation of about 900 feet of new 24-inch-diameter pipeline (TL–615) and a new meter station in Greene County, Pennsylvania;
- Upgrades within DTI's existing Boom Compressor Station, in Tioga County, Pennsylvania;
- Modifications at DTI's existing Finnefrock Compressor Station in Clinton County, Pennsylvania; and
- Upgrades at DTI's existing Lindley Gate in Steuben County, New York.

The proposed Sabinsville to Morrisville Project in Docket No. CP12–20–000 includes the following facilities in Tioga County, Pennsylvania:

- Installation of about 3.6 miles of new 24-inch-diameter pipeline (TL–610);
- Tie-ins and piping within DTI's existing Sabinsville Gas Storage Station; and
- A tie-in to the existing Tennessee Gas Pipeline Sabinsville Meter Station.

The FERC staff mailed copies of the EA to federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Indian tribes with an interest in the project area; potentially affected landowners; newspapers and libraries in the region; and parties to this proceeding. In addition, the EA is available for public viewing on the FERC's Web site (*www.ferc.gov*) using the eLibrary link. A limited number of copies of the EA are available for distribution and public inspection at: Federal Energy Regulatory Commission, Public Reference Room, 888 First Street NE., Room 2A, Washington, DC 20426, (202) 502–8371.

Any person wishing to comment on the EA may do so. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that the Commission has the opportunity to consider your comments prior to making its decision on this project, it is important that we receive your comments in Washington, DC on or before December 31, 2012.

For your convenience, there are three methods you can use to file your comments to the Commission. In all instances, please reference the project docket numbers (CP12–19–000 and CP12–20–000) with your submission. The Commission encourages electronic filing of comments and has expert staff available to assist you at (202) 502–8258 or *efiling@ferc.gov.*

(1) You can file your comments electronically using the eComment feature on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. This is an easy method for submitting brief, text-only comments on a project;

(2) You can also file your comments electronically using the eFiling feature on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You must select the type of filing you are making. If you are filing a comment on a particular project, please select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

Any person seeking to become a party to the proceeding must file a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedures (18 CFR 385.214).[1] Only intervenors have the right to seek rehearing of the Commission's decision. The Commission grants affected landowners and others with environmental concerns intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which no other party can adequately represent. Simply filing environmental comments will not give you intervenor status, but you do not need intervenor status to have your comments considered.

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC Web site (*www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search,'' and enter the docket number excluding the last three digits in the Docket Number field (i.e., CP12–19). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with

[1] See the previous discussion on the methods for filing comments.

notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/esubscribenow.htm.*

Dated: November 30, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–29813 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER13–504–000]

Electricity NH, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding, of Electricity NH, LLC's application for market-based rate authority, with an accompanying rate schedule, noting that such application includes a request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability is December 26, 2012.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding(s) are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 5, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–29848 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14446–001]

Peabody Trout Creek Reservoir LLC;

Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On November 30, 2012, Peabody Trout Creek Reservoir LLC (Peabody) filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Peabody Trout Creek Reservoir Hydroelectric Project (Trout Creek Reservoir Project or project) to be located on Trout Creek, near Steamboat Springs, Routt County, Colorado. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of: (1) A 1,900-foot-long, 75-foot-high, compacted earth-fill dam with a normal high water elevation of 6,669 feet above mean sea level forming a 392-acre reservoir and impounding 11,720 acre-feet of water; (2) a primary spillway consisting of a 54-inch-diameter ductile iron reinforced concrete conduit; (3) a 200-foot-long, earthen, side-channel emergency spillway with an armored crest, sides, and outlet works and a width that varies between 350 feet at the crest and 500 feet at the exit spillway; (4) water supply and hydropower intakes consisting of three separate intakes discharging from three levels inside the reservoir pool; (5) a 40-foot by 30-foot, two-story combined water treatment plant, pump station, and powerhouse containing a 125-kilowatt turbine-generator; (6) a 200-foot-long primary transmission line connecting to an existing 7.2-kilovolt transmission line owned by Yampa Valley Electric Association; and (7) appurtenant facilities. The project would generate an estimated average of 756 megawatt-hours annually.

Applicant Contact: Brian Yansen, Director of Real Estate Development, Peabody Trout Creek Reservoir LLC, 701 Market Street, St. Louis, Missouri 63101–1826; phone: (314) 342–3400.

FERC Contact: Shana Murray; phone: (202) 502–8333.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–14446) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: December 4, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–29793 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14464–000]

Cascade Energy Storage, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On October 23, 2012, Cascade Energy Storage, LLC, filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Cascade Pumped Storage Project (Cascade Project or project) to be located on Mud Lake, near Granite Falls, Snohomish County, Washington. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following: (1) A 50-foot-high, 7,500-foot-long upper concrete-faced rockfill, roller-compacted concrete, or earthen dam; (2) an upper reservoir with surface area of 100 acres and storage capacity of 6,000 acre-feet at an elevation of 2,240 feet mean sea level (msl); (3) a 115-foot-high, 1,160-foot-long lower concrete-faced rockfill or roller-compacted concrete dam; (4) a lower reservoir with surface area of 109 acres and storage capacity of 7,120 acre-feet at an elevation of 800 feet msl; (5) a 18.5-foot-diamter, 5,100-foot-long concrete-lined headrace; (6) a 22.2-foot-diameter, 500-foot-long concrete-, steel-, or concrete and steel-lined tailrace; (7) a pump-powerhouse with four 150-megawatt reversible pump-turbines; (8) a new 5.5 to 11.0-mile-long double-circuit 230-kilovolt (kV) overhead transmission line with interconnection to either: (i) Seattle City Light's existing 230-kV transmission line, or (ii) Bonneville Power Administration's (BPA) existing Custer-Monroe 500-kV line, or (iii) BPA existing Murray substation, or (iv) a new 4.5-mile-long underground 230-kV transmission line running parallel to the existing Seattle City Light's transmission line and then to the BPA Murray substation; and (9) appurtenant facilities. The estimated annual generation of the Cascade Project would be 1,314 gigawatt-hours.

Applicant Contact: Mr. Matthew Shapiro, Chief Executive Officer, Cascade Energy Storage, LLC, 1210 W. Franklin Street, Ste. 2, Boise, Idaho 83702; phone: (208) 246–9925.

FERC Contact: John Matkowski; phone: (202) 502–8576.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–14464) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: November 30, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–29803 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14465–000]

North Star Hydro Services, CA LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On November 6, 2012, North Star Hydro Services CA, LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Marble Bluff Dam Hydropower Project to be located at the U.S. Bureau of Reclamation's Marble Bluff dam on the Truckee River, near Nixon, Washoe County, Nevada. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The applicant proposes to build a 20-foot-high by 12-foot-wide sluice gate east of the existing spillway of the Marble Bluff dam. Flow diverted at the sluice gate would be used to generate power at a new 1,300-kilowatt powerhouse, with an associated penstock, tailrace, and stilling basin. The applicant estimates the powerhouse would generate 5.62 gigawatt-hours annually.

Applicant Contact: Mr. David Holland, North Star Hydro Services CA, LLC, 1110 West 131st Street South, Jenks, Oklahoma,74037; phone: (918) 398–0233.

FERC Contact: Jim Fargo at *james.fargo@ferc.gov;* phone: (202) 502–6095.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–14465) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: November 29, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–29804 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP13–16–000]

Honeoye Storage Corporation: Notice of Request Under Blanket Authorization

Take notice that on November 16, 2012, Honeoye Storage Corporation (Honeoye) as supplemented on November 29, 2012, 4511 Egypt Road, Canandaigua, New York 14424, filed in Docket No. CP13–16–000, a prior notice request pursuant to sections 157.205 and 157.214 of the Federal Energy Regulatory Commission's regulations under the Natural Gas Act for authorization to increase the maximum storage capacity and working gas capacity of the Honeoye Storage facitility located in Ontario County, New York. Specifically, Honeoye proposes to increase the maximum storage capacity from 11.25 Bcf to 11.45 Bcf and working storage capacity from 6.57 Bcf to 6.77 Bcf. ANR states the increased capacity will be offered to customers on a firm or non firm basis, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

Any questions regarding this Application should be directed to Richard A. Norman, Honeoye Storage Corporation, c/o Essex Hydro Assoc., L.L.C., 55 Union Street, 4th Floor, Boston, MA 02108, or call (617) 367–0032, or by email *ran@essexhydro.com.*

Any person may, within 60 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention. Any person filing to intervene or the Commission's staff may, pursuant to section 157.205 of the Commission's Regulations under the NGA (18 CFR 157.205) file a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenter's will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenter's will not be required to serve copies of filed documents on all other parties. However, the non-party commentary, will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the internet in lieu of paper. See 18 CFR 385.2001(a) (1) (iii) and the instructions on the Commission's Web site (*www.ferc.gov*) under the ''e-Filing'' link.

Dated: November 30, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–29811 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP13–17–000]

Southern Natural Gas Company, L.L.C.; Notice of Request Under Blanket Authorization

Take notice that on November 20, 2012, Southern Natural Gas Company, L.L.C. (Southern), 569 Brookwood Village, Suite 749, Birmingham, Alabama 35209, filed in Docket No. CP13–17–000, an application pursuant to sections 157.205, 157.208, 157.213, and 157.216 of the Commission's Regulations under the Natural Gas Act (NGA) as amended, to make certain modifications to facilities at Southern's Muldon Gas Storage Field (Muldon Field) in Monroe County, Mississippi, in order to convert 5 billion cubic feet (Bcf) of natural gas capacity in the Muldon Field from cushion gas to working gas, under Southern's blanket certificate issued in Docket No. CP82–406–000,[1] all as more fully set forth in the application which is on file with the Commission and open to the public for inspection.

Southern proposes to convert 5 Bcf of natural gas capacity at the Muldon Field from cushion gas to working gas and to make certain facilities modifications. Southern asserts that the total capacity of the Muldon Field would remain at the currently maximum certificated level of 92.82 Bcf.[2] Southern states that the propose facilities modifications would take place over a two-year period. Southern also states that in 2013 it would add separators, heaters, regulators, salt water storage tanks, and associated piping and controls to the existing plant; work on seven existing wells; install approximately 3,200 feet of 8-inch diameter pipe and associated valves; and remove approximately 200 feet of abandoned pipe. Southern further states that in 2014 it would make additional modifications to existing, including minor adjustments and modifications to the new facilities; work on four existing wells, drill one new well; and install approximately 650 feet of 8-inch diameter pipe for the new well. Southern estimates that it would cost $16,000,000 to modify and construct the proposed facilities.

Pursuant to the standard conditions for a certificate issued under the Commission's Blanket Certificate

[1] *Southern Natural Gas Company,* 20 FERC ¶ 62,414 (1982).

[2] *Southern Natural Gas Company,* 46 FPC 813 (1971).

program, Part 157, Subpart F of the Commission's Regulations, section 157.206(c) states that ''any authorized construction, extension, or acquisition shall be completed and made available for service by the certificate holder and any authorized operation, or service, shall be available within one year of the date the activity is authorized''. As described above, Southern's proposed project will span two years given the nature of the changes proposed for the operation of its Muldon storage field. Thus, pursuant to section 157.206(c), Southern must seek an extension of that one year deadline for the activities not completed during that first year just prior to the beginning of the second year of the project and describe progress of the project at that point.

Any questions concerning this application may be directed to Tina A. Hardy, Regulatory Manager, Southern Natural Gas Company, L.L.C., 569 Brookwood Village, Suite 749, Birmingham, Alabama 35209 or via telephone at (205) 325–3668, or via email: *tina_hardy@kindermorgan.com.*

This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov,* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number filed to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or call toll-free at (866) 206–3676, or, for TTY, contact (202) 502–8659. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages intervenors to file electronically.

Any person or the Commission's staff may, within 60 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to section 157.205 of the regulations under the NGA (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the allowed time for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the NGA.

Dated: November 30, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–29812 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 7910–006]

Milburnie Hydro Inc.; Notice of Termination of Exemption by Implied Surrender and Soliciting Comments, Protests, and Motions To Intervene

Take notice that the following hydroelectric proceeding has been initiated by the Commission:

a. *Type of Proceeding:* Termination of exemption by implied surrender.

b. *Project No.:* 7910–006.

c. *Date Initiated:* December 4, 2012.

d. *Exemptee:* Milburnie Hydro Inc.

e. *Name and Location of Project:* The Milburnie Hydroelectric Project is located on Neuse River in Wake County, North Carolina.

f. *Filed Pursuant to:* 18 CFR 4.106.

g. *Exemptee Contact Information:* Mr. Michael Allen, President, Milburnie Hydro, P.O. Box 1401, Burlington, NC 27216–1401.

h. *FERC Contact:* Krista Sakallaris (202) 502–6302 or *Krista.Sakallaris@ferc.gov.*

i. Deadline for filing comments, protests, and motions to intervene is 30 days from the issuance date of this notice. Please file your submittal electronically via the Internet (eFiling) in lieu of paper. Please refer to the instructions on the Commission's Web site under *http://www.ferc.gov/docs-filing/efiling.asp* and filing instructions in the Commission's Regulations at 18 CFR section 385.2001(a)(1)(iii).[1] To assist you with eFilings you should refer to the submission guidelines document at *http://www.ferc.gov/help/submission-guide/user-guide.pdf.* In addition, certain filing requirements have statutory or regulatory formatting and other instructions. You should refer to a list of these ''qualified documents'' at *http://www.ferc.gov/docs-filing/efiling/filing.pdf.* You must include your name and contact information at the end of your comments. Please include the project number (P–7910–006) on any documents or motions filed. The Commission strongly encourages electronic filings; otherwise, you should submit an original and seven copies of its submittal to the following address: The Secretary, Federal Energy Regulatory Commission, Mail Code: DHAC, PJ–12, 888 First Street NE., Washington, DC 20426.

j. *Description of Existing Facilities:* The inoperative project consists of the following existing facilities: (1) A 14-foot-high and 625-foot-long concrete dam; (2) a reservoir with an estimated storage area of 500 acre-feet; (3) a powerhouse with a total installed capacity of 645 kW; (4) transmission lines; and (5) appurtenant facilities.

k. Description of Proceeding: The exemptee is in violation of Standard Article 1 of its exemption; which was granted on May 11, 1984 (27 FERC ¶ 62,132). The Commission's regulations, 18 CFR 4.106, provides, among other things, that the Commission reserves the right to revoke an exemption if any term or condition of the exemption is violated. At some point between May 2006 and September 2009, vandals stole wiring from the projects powerhouse, causing the project to become inoperable.

On October 21, 2009, August 21, 2012, and on November 16, 2012, the Commission directed the exemptee to file a public safety plan and a plan and schedule to restore operation to the project, or to surrender the exemption. The Commission also informed the exemptee that it was in violation of the terms and conditions of the exemption. The exemptee has not attempted to restore project operation and has not responded to the Commissions letters by filing the required plans.

The Division of Dam Safety and Inspections accompanied by staff from the U.S. Fish and Wildlife Service and the North Carolina Department of Environment and Natural Resources inspected the project in August 2012; neither the exemptee nor a representative for the project attended the inspection. The exemptee has not properly maintained the project and it remains inoperable. By not operating the project as proposed and authorized, the exemptee is in violation of the terms and conditions of the exemption.

l. This notice is available for review and reproduction at the Commission in the Public Reference Room, Room 2A, 888 First Street NE., Washington, DC 20426. The filing may also be viewed on the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the Docket number (P–7910–006) excluding the last three digits in the docket number field to access the notice. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via

[1] *http://www.ferc.gov/legal/fed-sta.asp* Select the link for Code of Federal Regulations and navigate to § 385.2001.

email of new filings and issuances related to this or other pending projects. For assistance, call toll-free 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov*. For TTY, call (202) 502–8659.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified deadline date for the particular proceeding.

o. *Filing and Service of Responsive Documents*—Any filing must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE,'' as applicable; (2) set forth in the heading the project number of the proceeding to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, protests or motions to intervene must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). All comments, protests, or motions to intervene should relate to project works which are the subject of the termination of exemption. A copy of any protest or motion to intervene must be served upon each representative of the exemptee specified in item g above. If an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of all other filings in reference to this notice must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

p. Agency Comments—Federal, state, and local agencies are invited to file comments on the described proceeding. If any agency does not file comments within the time specified for filing comments, it will be presumed to have no comments.

Dated: December 4, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–29794 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 10078–053]

Eau Galle Renewable Energy Company, Eau Galle Hydro, LLC; Notice of Transfer of Exemption

1. By letter filed October 12, 2012, Eau Galle Renewable Energy Company informed the Commission that its exemption from licensing for the Eau Galle Hydroelectric Project, FERC No. 10078, originally issued March 10, 1987,[1] and transferred to Eau Galle Renewable Energy Company by letter.[2] The project is located on the Eau Galle River in Dunn County, Wisconsin. The transfer of an exemption does not require Commission approval.

2. Mr. Jason Kreuscher, Eau Galle Hydro, LLC, P.O. Box 264, 100 S. State Street, Neshkoro, WI 54960 is now the exemptee of the Eau Galle Hydroelectric Project, FERC No. 10078.

Dated: December 4, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–29795 Filed 12–10–12; 8:45 am]

BILLING CODE 6717–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 4, 2012.

A. Federal Reserve Bank of Richmond (Adam M. Drimer, Assistant Vice President) 701 East Byrd Street, Richmond, Virginia 23261–4528:

1. *Piedmont Community Bank Holdings, Inc., and Crescent Financial Bancshares, Inc.,* both in Raleigh, North Carolina; to acquire 100 percent of the voting shares of ECB Bancorp, Inc., and thereby indirectly acquire voting shares of The East Carolina Bank, both in Engelhard, North Carolina.

B. Federal Reserve Bank of Atlanta (Chapelle Davis, Assistant Vice President) 1000 Peachtree Street, NE., Atlanta, Georgia 30309:

1. *4830 Acquistion Company, LLC,* Tampa, Florida; to become a bank holding company by acquiring 100 percent of the voting shares of Southern Commerce Bank, National Association, Tampa, Florida.

Board of Governors of the Federal Reserve System, December 6, 2012.

Margaret McCloskey Shanks,

Deputy Secretary of the Board.

[FR Doc. 2012–29845 Filed 12–10–12; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Government in the Sunshine Act; Meeting Notice

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System.

TIME AND DATE: 3:00 p.m. on Friday, December 14, 2012.

PLACE: Marriner S. Eccles Federal Reserve Board Building, 20th Street, entrance between Constitution Avenue and C Streets NW., Washington, DC 20551.

STATUS: Open.

[1] 38 FERC ¶ 62,225, Order Granting Exemption From Licensing (5 MW or Less) And Dismissing Preliminary Permit Application With Prejudice.

[2] Letter notifying the Commission of the Transfer of Exemption for Project No. 10078, filed July 13, 2000.

On the day of the meeting, you will be able to view the meeting via webcast from a link available on the Board's public Web site. *You do not need to register to view the webcast of the meeting.* A link to the meeting documentation will also be available approximately 20 minutes before the start of the meeting. Both links may be accessed from the Board's public Web site at *www.federalreserve.gov*.

If you plan to attend the open meeting in person, we ask that you notify us in advance and provide your name, date of birth, and social security number (SSN) or passport number. You may provide this information by calling 202–452–2474 or you may *register online.* You may pre-register until close of business on December 13, 2012. You also will be asked to provide identifying information, including a photo ID, before being admitted to the Board meeting. The Public Affairs Office must approve the use of cameras; please call 202–452–2955 for further information. If you need an accommodation for a disability, please contact Penelope Beattie on 202–452–3982. For the hearing impaired only, please use the Telecommunication Device for the Deaf (TDD) on 202–263–4869.

PRIVACY ACT NOTICE: The information you provide will be used to assist us in prescreening you to ensure the security of the Board's premises and personnel. In order to do this, we may disclose your information consistent with the routine uses listed in the Privacy Act Notice for BGFRS–32, including to appropriate federal, state, local, or foreign agencies where disclosure is reasonably necessary to determine whether you pose a security risk or where the security or confidentiality of your information has been compromised. We are authorized to collect your information by 12 U.S.C 243 and 248, and Executive Order 9397. In accordance with Executive Order 9397, we collect your SSN so that we can keep accurate records, because other people may have the same name and birth date. In addition, we use your SSN when we make requests for information about you from law enforcement and other regulatory agency databases. Furnishing the information requested is voluntary; however, your failure to provide any of the information requested may result in disapproval of your request for access to the Board's premises. You may be subject to a fine or imprisonment under 18 U.S.C. 1001 for any false statements you make in your request to enter the Board's premises.

Matters To Be Considered

DISCUSSION AGENDA: 1. Discussion of proposals implementing sections 165 and 166 of the Dodd-Frank Act (enhanced prudential standards and early remediation requirements) for large foreign banking organizations and foreign nonbank companies supervised by the Board.

Notes: 1. The staff memo to the Board will be made available to the public on the day of the meeting in paper and the background material will be made available on a compact disc (CD). If you require a paper copy of the entire document, please call Penelope Beattie on 202–452–3982. The documentation will not be available until about 20 minutes before the start of the meeting.

2. This meeting will be recorded for the benefit of those unable to attend. The webcast recording and a transcript of the meeting will be available after the meeting on the Board's public web site *http://www.federalreserve.gov/aboutthefed/boardmeetings/20121214openmemo.htm* or if you prefer, a CD recording of the meeting will be available for listening in the Board's Freedom of Information Office, and copies can be ordered for $4 per disc by calling 202–452–3684 or by writing to:

Freedom of Information Office, Board of Governors of the Federal Reserve System, Washington, DC 20551.

FOR MORE INFORMATION PLEASE CONTACT: Michelle Smith, Director, or Dave Skidmore, Assistant to the Board, Office of Board Members at 202–452–2955.

SUPPLEMENTARY INFORMATION: You may call 202–452–3206 for a recorded Announcement of this meeting; or you may access the Board's public Web site at *www.federalreserve.gov* for an electronic announcement. (The Web site also includes procedural and other information about the open meeting.)

Dated: December 7, 2012.

Robert deV. Frierson,

Secretary of the Board.

[FR Doc. 2012–29942 Filed 12–7–12; 4:15 pm]

BILLING CODE 6210–01–P

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Sunshine Act; Notice of Meeting

TIME AND DATE: 12:00 p.m. (Eastern Time), December 13, 2012.

PLACE: 10th Floor Conference Room, 77 K Street, NE., Suite 1000, Washington, DC 20002.

STATUS: Will be closed to the public.

MATTERS TO BE CONSIDERED:

Part Closed to the Public

1. Personnel

CONTACT PERSON FOR MORE INFORMATION: Kimberly A. Weaver, Director, Office of External Affairs, (202) 942–1640.

Dated: December 6, 2012.

James B. Petrick,

Secretary, Federal Retirement Thrift Investment Board.

[FR Doc. 2012–29934 Filed 12–7–12; 11:15 am]

BILLING CODE 6760–01–P

FEDERAL TRADE COMMISSION

[File No. 112 3182]

Epic Marketplace, Inc., and Epic Media Group, LLC; Analysis of Proposed Consent Order To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before January 7, 2013.

ADDRESSES: Interested parties may file a comment at *https://ftcpublic.commentworks.com/ftc/epicmarketplaceconsent* online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write AEpic, File No. 112 3182'' on your comment and file your comment online at *https://ftcpublic.commentworks.com/ftc/epicmarketplaceconsent* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Kate White (202–326–2878), FTC, Bureau of Consumer Protection, 600 Pennsylvania Avenue NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent

order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for December 5, 2012), on the World Wide Web, at *http://www.ftc.gov/os/actions.shtm.* A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue NW., Washington, DC 20580, either in person or by calling (202) 326–2222.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before January 7, 2013. Write AEpic, File No. 112 3182'' on your comment. Your comment B including your name and your state B will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any A[t]rade secret or any commercial or financial information which * * * is privileged or confidential,'' as discussed in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[1] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/epicmarketplaceconsent* by following the instructions on the web-based form. If this Notice appears at *http://www.regulations.gov/#!home,* you also may file a comment through that Web site.

If you file your comment on paper, write AEpic, File No. 112 3182'' on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue NW., Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before January 7, 2013. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

Analysis of Agreement Containing Consent Order To Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, a consent agreement from Epic Marketplace, Inc. and Epic Media Group, LLC.

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

Epic Marketplace, Inc. (''Epic'') is an advertising company that engages in online behavioral advertising, which is the practice of tracking a consumer's online activities in order to deliver advertising targeted to the consumer's interests. Epic is a wholly-owned subsidiary of Epic Media Group, LLC (''EMG''). Epic acts as an intermediary between Web site owners who publish advertisements on their Web site for a fee (''publishers'') and advertisers who wish to have their advertisements placed on Web sites. Epic purchases advertising space on publishers' Web sites and contracts with advertisers to place their advertisements on the Web sites. Epic refers to the network of Web sites on which it purchases advertising space as the Epic Marketplace Network, which includes over 45,000 publishers.

The Commission's complaint alleges that, from March 2010 through August 2011, Epic engaged in ''history sniffing''—running software code on a Web page to determine whether a user has previously visited a Web page—by checking how a user's browser styles the display of a hyperlink. This practice allegedly allowed Epic to determine whether a consumer had visited any of over 54,000 domains, including pages relating to fertility issues, impotence, menopause, incontinence, disability insurance, credit repair, debt relief, and personal bankruptcy. According to the complaint, history sniffing allowed Epic to determine whether consumers had visited Web pages that were outside the Epic Marketplace Network, information it would not otherwise have been able to obtain, and Epic used this history-sniffing data for behavioral targeting purposes.

The FTC's complaint charges that Epic and EMG violated Section 5(a) of the FTC Act by falsely representing to consumers that respondents only collected information on consumers' visits to Web sites within the Epic Marketplace Network. The complaint also alleges that the companies failed to disclose to consumers that they were engaged in history sniffing.

The proposed order contains provisions designed to prevent Epic; EMG; their parent company FAS Labs, Inc.; and any of their subsidiaries, successors, and assigns (collectively, ''respondents'') from engaging in practices similar to those alleged in the complaint in the future.

Part I of the proposed order prohibits respondents from misrepresenting in any manner, expressly or by implication: (A) The extent to which they maintain the privacy or

[1] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

confidentiality of data from or about a particular consumer, computer, or device, including but not limited to the extent to which that data is collected, used, disclosed, or shared; or (B) the extent to which software code on a Web page determines whether a user has previously visited a Web page.

Part II of the proposed order prohibits respondents from collecting any data through history sniffing—running software code on a Web page to determine whether a user has previously visited a Web page by checking how a user's browser styles the display of a hyperlink or by accessing a user's browser cache—or using any data obtained by history sniffing.

Part III of the proposed order prohibits respondents from using, disclosing, selling, renting, leasing, or transferring any information that was collected using history sniffing. In addition, within five (5) days after the date of service of the order, respondents must permanently delete or destroy all information collected using history sniffing.

Parts IV through VIII of the proposed order are reporting and compliance provisions. Part IV requires that respondents retain, for a period of three (3) years, documents relating to its compliance with the order. Part V requires dissemination of the order to all current and future principals, officers, directors, and managers; and all current and future managers, employees, agents, and representatives who have responsibilities on behalf of respondents with respect to the subject matter of this order. Part VI ensures notification to the FTC of changes in corporate status. Part VII mandates that respondents submit an initial compliance report to the FTC and make available to the FTC subsequent reports. Part VIII is a provision ''sunsetting'' the order after twenty (20) years, with certain exceptions.

The purpose of the analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed complaint or order or to modify the order's terms in any way.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2012–29880 Filed 12–10–12; 8:45 am]

BILLING CODE 6750–01–P

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090–0274; Docket 2012–0001; Sequence 16]

Public Buildings Service; Submission for OMB Review; Art-in-Architecture Program National Artist Registry (GSA Form 7437)

AGENCY: Public Buildings Service (GSA).

ACTION: Notice of request for comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement regarding Art-in Architecture Program National Artist Registry (GSA Form 7437). A notice was published in the **Federal Register** at 77 FR 58141, on September 19, 2012. No comments were received.

The Art-in-Architecture Program is the result of a policy decision made in January 1963 by GSA Administrator Bernard L. Boudin who had served on the Ad Hoc Committee on Federal Office Space in 1961–1962.

The program has been modified over the years, most recently in 2009 when a requirement was instituted that all artists who want to be considered for any potential GSA commission must be included on the National Artists Registry, which serves as the qualified list of eligible artists. The program continues to commission works of art from living American artists. One-half of one percent of the estimated construction cost of new or substantially renovated Federal buildings and U.S. courthouses is allocated for commissioning works of art.

Public comments are particularly invited on: Whether this collection of information is necessary and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected.

DATES: Submit comments on or before: January 10, 2013.

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer Gibson, Office of the Chief Architect, Art-in-Architecture & Fine Arts Division (PCAC), 1800 F Street NW., Room 3305, Washington, DC 20405, at telephone(202) 501–0930 or via email to *Jennifer.gibson@gsa.gov.*

ADDRESSES: Submit comments identified by Information Collection 3090–0274, Art-in-Architecture Program National Artist Registry (GSA Form 7437), by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching the OMB control number. Select the link ''Submit a Comment'' that corresponds with ''Information Collection 3090–0274, Art-in-Architecture Program National Artist Registry (GSA Form 7437).'' Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 3090–0274, Art-in-Architecture Program National Artist Registry (GSA Form 7437)'' on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services. Administration. Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417. ATTN: Hada Flowers/IC 3090–0274, Art-in-Architecture Program National Artist Registry (GSA Form 7437).

Instructions: Please submit comments only and cite Information Collection 3090–0274, Art-in-Architecture Program National Artist Registry (GSA Form 7437), in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

SUPPLEMENTARY INFORMATION:

A. Purpose

The Art-in-Architecture Program actively seeks to commission works from the full spectrum of American artists and strives to promote new media and inventive solutions for public art. The GSA Form 7437, Art-in-Architecture Program National Artist Registry, will be used to collect information from artists across the country to participate and to be considered for commissions.

B. Annual Reporting Burden

Respondents: 300.
Responses Per Respondent: 1.
Total Responses: .25.
Hours per Response: .25.
Total Burden Hours: 75.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417, telephone (202) 501–4755. Please cite OMB Control No. 3090–0274, Art-in-Architecture Program National Artist

Registry (GSA Form 7437), in all correspondence.

Dated:December 3, 2012.

Casey Coleman,

Chief Information Officer.

[FR Doc. 2012–29890 Filed 12–10–12; 8:45 am]

BILLING CODE 6820–34–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Docket 2012–0076; Sequence 38; OMB Control No. 9000–0066]

Federal Acquisition Regulation; Submission for OMB Review; Professional Employee Compensation Plan

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for comments regarding the extension of a previously existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning submission of a Professional Employee Compensation Plan. A notice was published in the **Federal Register** at 77 FR 45612, on August 1, 2012. One respondent submitted comments.

Public comments are particularly invited on: Whether this collection of information is necessary; whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before January 10, 2013.

ADDRESSES: Submit comments identified by Information Collection 9000–0066, Professional Employee Compensation Plan by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching the OMB control number. Select the link ''Submit a Comment'' that corresponds with ''Information Collection 9000–0066, Professional Employee Compensation Plan''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 9000–0066, Professional Employee Compensation Plan'' on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services. Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417. ATTN: Hada Flowers/IC 9000–0066, Professional Employee Compensation Plan.

Instructions: Please submit comments only and cite Information Collection 9000–0066, Professional Employee Compensation Plan, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Edward Loeb, Procurement Analyst, Office of Acquisition Policy, GSA, (202) 501–3775 or email *Edward.loeb@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

FAR 22.1103 requires that all professional employees are compensated fairly and properly. Accordingly, FAR 52.222–46, Evaluation of Compensation for Professional Employees, is required to be inserted in solicitations for negotiated service contracts when the contract amount is expected to exceed $650,000 and the service to be provided will require meaningful numbers of professional employees. The purpose of the provision at FAR 52.222–46 is to require offerors to submit for evaluation a total compensation plan setting forth proposed salaries and fringe benefits for professional employees working on the contract. Plans indicating unrealistically low professional employees' compensation may be assessed adversely as one of the factors considered in making a contract award.

B. Analysis of Public Comments

One respondent submitted public comments on the extension of the previously approved information collection. The analysis of the public comments is summarized as follows:

Comment: The respondent commented that the extension of the information collection would violate the fundamental purposes of the Paperwork Reduction Act because of the burden it puts on the entity submitting the information and the agency collecting the information.

Response: In accordance with the Paperwork Reduction Act (PRA), agencies can request OMB approval of an existing information collection. The PRA requires that agencies use the **Federal Register** notice and comment process, to extend OMB's approval, at least every three years. This extension, to a previously approved information collection, pertains to the provision at FAR 52.222–46, Evaluation of Compensation for Professional Employees, in solicitations for negotiated service contracts when the contract amount is expected to exceed $650,000 and the service to be provided will require meaningful numbers of professional employees. The purpose of the provision at FAR 52.222–46 is to require offerors to submit for evaluation a total compensation plan setting forth proposed salaries and fringe benefits for professional employees working on the contract. Plans indicating unrealistically low professional employees' compensation may be assessed adversely as one of the factors considered in making a contract award. Not granting this extension would remove Government evaluators' discretion to adversely assess offers containing unrealistically low professional employees' compensation, and would result in the Government's inability to ensure that professional employees are fairly and properly compensated for their work.

Comment: The respondent commented that the agency did not accurately estimate the public burden challenging that the agency's methodology for calculating it is insufficient and inadequate and does not reflect the total burden. The respondent stated that the estimate of one response per respondent annually and .5 hours of burden per response is understated, many companies submit upwards of 100 plans per year, and the burden is more likely in the range of five hours. For this reason, the respondent provided that the agency should reassess the estimated total burden hours and revise the estimate upwards to be more accurate, as was done in FAR Case 2007–006. The same respondent also provided that the burden of compliance with the information collection requirement greatly exceeds the agency's estimate

and outweighs any potential utility of the extension.

Response: Serious consideration is given, during the open comment period, to all comments received and adjustments are made to the paperwork burden estimate based on reasonable considerations provided by the public. This is evidenced, as the respondent notes, in FAR Case 2007–006 where an adjustment was made from the total preparation hours from three to 60. This change was made considering particularly the hours that would be required for review within the company, prior to release to the Government.

The burden is prepared taking into consideration the necessary criteria in OMB guidance for estimating the paperwork burden put on the entity submitting the information. For example, consideration is given to an entity reviewing instructions; using technology to collect, process, and disclose information; adjusting existing practices to comply with requirements; searching data sources; completing and reviewing the response; and transmitting or disclosing information. The estimated burden hours for a collection are based on an average between the hours that a simple disclosure by a very small business might require and the much higher numbers that might be required for a very complex disclosure by a major corporation. Also, the estimated burden hours should only include projected hours for those actions which a company would not undertake in the normal course of business. Careful consideration went into assessing the estimated burden hours for this collection, and although, the respondent provided specific estimates of responses and burden hours, the estimates cannot be confirmed. However, it is determined that an upward adjustment is warranted at this time based upon consideration of the information provided in the public comment and updated Federal Procurement Data System information. The information collection requirement has been revised to reflect an overall increase in the total public burden hours from 4,335 to 52,220.

C. Annual Reporting and Recordkeeping Burden

Respondents: 13,055.
Responses per Respondent: 3.
Total Responses: 39,165.
Hours per Response: 1.333333.
Total Burden Hours: 52,220.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417, telephone (202) 501–4755. Please cite OMB Control No. 9000–0066, Professional Employee Compensation Plan, in all correspondence.

Dated: December 3, 2012.

William Clark,

Acting Director, Federal Acquisition Policy Division, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2012–29888 Filed 12–10–12; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0058; Docket 2012–0076; Sequence 55]

Federal Acquisition Regulation; Information Collection; Schedules for Construction Contracts

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of reinstatement request for an information collection requirement regarding an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning schedules for construction contracts.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the Federal Acquisition Regulations (FAR), and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before February 11, 2013.

ADDRESSES: Submit comments identified by Information Collection 9000–0058, Schedules for Construction Contracts by any of the following methods:

- *Regulations.gov*: *http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching the OMB control number. Select the link ''Submit a Comment'' that corresponds with ''Information Collection 9000–0058, Schedules for Construction Contracts''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 9000–0058, Schedules for Construction Contracts'' on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services. Administration, Regulatory Secretariat (MVCB), 1275 First Street, NE., Washington, DC 20417. ATTN: Hada Flowers/IC 9000–0058, Schedules for Construction Contracts.

Instructions: Please submit comments only and cite Information Collection 9000–0058, Schedules for Construction Contracts, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Curtis E. Glover, Sr., Procurement Analyst, Office of Acquisition Policy, (202) 501–1448 or email *Curtis.glover@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

Federal construction contractors may be required to submit schedules, in the form of a progress chart, showing the order in which the contractor proposes to perform the work. In accordance with FAR 52.236–15, a contractor shall, within five days after work commences on the contract or another period of time determined by the contracting officer, prepare and submit to the contracting officer for approval three copies of a practicable schedule showing the order in which the contractor proposes to perform the work, and the dates on which the contractor contemplates starting and completing the several salient features of the work (including acquiring materials, plants, and equipment). This information is used to monitor progress under a Federal construction contract when other management approaches for ensuring adequate progress are not used. If the Contractor fails to submit a schedule within the time prescribes, the Contracting Officer may withhold approval of progress payments until the

Contractor submits the required schedule.

B. Annual Reporting Burden

Respondents: 2,600.
Responses per Respondent: 2.
Annual Responses: 5,200.
Hours per Response: 1.
Total Burden Hours: 5,200.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417, telephone (202) 501–4755. Please cite OMB Control No. 9000–0058, Schedules for Construction Contracts, in all correspondence.

Dated: November 26, 2012.

William Clark,

Acting Director, Federal Acquisition Policy Division, Office of Governmentwide Acquisition Policy, Office Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2012–29898 Filed 12–10–12; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Docket 2012–0076; Sequence 51; OMB Control No. 9000–0108]

Federal Acquisition Regulation; Information Collection; Bankruptcy (FAR subpart 42.9; 52.242–13)

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for comments regarding the extension of a previously existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning Bankruptcy.

Public comments are particularly invited on: Whether this collection of information is necessary; whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before January 10, 2013.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417. Please cite OMB Control No. 9000–0107, Notice of Radioactive Materials, in all correspondence.

FOR FURTHER INFORMATION CONTACT: Curtis E. Glover, Sr., Procurement Analyst, Contract Policy Division, GSA, (202) 501–1448 or email *curtis.glover@gsa.gov.*

A. Purpose

Under statute, contractors may enter into bankruptcy which may have a significant impact on the contractor's ability to perform its Government contract. The Government often does not receive adequate and timely notice of this event. The clause at 52.242–13 requires contractors to notify the contracting officer within 5 days after the contractor enters into bankruptcy.

B. Annual Reporting Burden.

Respondents: 790.

Responses per Respondent: 1.

Annual Responses: 790.

Hours per Response: 1.25.

Total Burden Hours: 988.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417, telephone (202) 501–4755. Please cite OMB Control No. 9000–0108, Bankruptcy, in all correspondence.

Dated: November 26, 2012.

William Clark,

Acting Director, Federal Acquisition Policy Division, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy.

[FR Doc. 2012–29909 Filed 12–10–12; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

HIT Policy Committee Advisory Meetings; Notice of Meetings

AGENCY: Office of the National Coordinator for Health Information Technology, HHS.

ACTION: Notice of meetings.

This notice announces forthcoming meetings of a public advisory committee of the Office of the National Coordinator for Health Information Technology (ONC). The meetings will be open to the public.

Name of Committee: HIT Policy Committee.

General Function of the Committee: To provide recommendations to the National Coordinator on a policy framework for the development and adoption of a nationwide health information technology infrastructure that permits the electronic exchange and use of health information as is consistent with the Federal Health IT Strategic Plan and that includes recommendations on the areas in which standards, implementation specifications, and certification criteria are needed.

Date and Time: These meetings will be held on the following dates and times:

January 8, 2013, 10:00 a.m. to 3:00 p.m./Eastern Time.
February 6, 2013, 10:00 a.m. to 3:00 p.m./Eastern Time.
March 14, 2013, 10:00 a.m. to 3:00 p.m./Eastern Time.
April 3, 2013, 10:00 a.m. to 3:00 p.m./Eastern Time.
May 7, 2013, 10:00 a.m. to 3:00 p.m./Eastern Time.
June 5, 2013, 10:00 a.m. to 3:00 p.m./Eastern Time.
July 9, 2013, 10:00 a.m. to 3:00 p.m./Eastern Time.
August 7, 2013, 10:00 a.m. to 3:00 p.m./Eastern Time.
September 4, 2013, 10:00 a.m. to 3:00 p.m./Eastern Time.
October 2, 2013, 10:00 a.m. to 3:00 p.m./Eastern Time.
November 6, 2013, 10:00 a.m. to 3:00 p.m./Eastern Time.
December 4, 2013, 10:00 a.m. to 3:00 p.m./Eastern Time.

For up-to-date information, go to the ONC Web site, *http://www.healthit.gov/faca.*

Contact Person: MacKenzie Robertson, Office of the National Coordinator, HHS, 355 E Street SW., Washington, DC 20201, 202–205–8089, Fax: 202–260–1276, email: *mackenzie.robertson@hhs.gov.* Please

call the contact person for up-to-date information on these meetings. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice.

Agenda: The committee will hear reports from its workgroups and updates from ONC and other Federal agencies. ONC intends to make background material available to the public no later than two (2) business days prior to each meeting. If ONC is unable to post the background material on its Web site prior to a meeting, it will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on ONC's Web site after each meeting, at *http://www.healthit.gov/faca.*

Procedure: ONC is committed to the orderly conduct of its advisory committee meetings. Interested persons may present data, information, or views, orally or in writing, on issues pending before the Committee. Written submissions may be made to the contact person on or before two days prior to the Committee's meeting date. Oral comments from the public will be scheduled in the agendas. Time allotted for each presentation will be limited to three minutes. If the number of speakers requesting to comment is greater than can be reasonably accommodated during a scheduled public comment period, ONC will take written comments after each meeting until close of business on that day.

Persons attending ONC's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

ONC welcomes the attendance of the public at its advisory committee meetings. Seating is limited at the location, and ONC will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact MacKenzie Robertson at least seven (7) days in advance of the meeting.

Notice of these meetings is given under the Federal Advisory Committee Act (Pub. L. No. 92–463, 5 U.S.C., App. 2).

Dated: December 4, 2012.

MacKenzie Robertson,

FACA Program Lead, Office of Policy and Planning, Office of the National Coordinator for Health Information Technology.

[FR Doc. 2012–29821 Filed 12–10–12; 8:45 am]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

HIT Standards Committee Advisory Meetings; Notice of Meetings

AGENCY: Office of the National Coordinator for Health Information Technology, HHS.

ACTION: Notice of meetings.

This notice announces forthcoming meetings of a public advisory committee of the Office of the National Coordinator for Health Information Technology (ONC). The meetings will be open to the public.

Name of Committee: HIT Standards Committee.

General Function of the Committee: To provide recommendations to the National Coordinator on standards, implementation specifications, and certification criteria for the electronic exchange and use of health information for purposes of adoption, consistent with the implementation of the Federal Health IT Strategic Plan, and in accordance with policies developed by the HIT Policy Committee.

Date and Time: These meetings will be held on the following dates and times:

January 16, 2013, from 9:00 a.m. to 3:00 p.m./Eastern Time.
February 20, 2013, from 9:00 a.m. to 3:00 p.m./Eastern Time.
March 27, 2013, from 9:00 a.m. to 3:00 p.m./Eastern Time.
April 17, 2013, from 9:00 a.m. to 3:00 p.m./Eastern Time.
May 15, 2013, from 9:00 a.m. to 3:00 p.m./Eastern Time.
June 20, 2013, from 9:00 a.m. to 3:00 p.m./Eastern Time.
July 17, 2013, from 9:00 a.m. to 3:00 p.m./Eastern Time.
August 22, 2013, from 9:00 a.m. to 3:00 p.m./Eastern Time.
September 18, 2013, from 9:00 a.m. to 3:00 p.m./Eastern Time.
October 16, 2013, from 9:00 a.m. to 3:00 p.m./Eastern Time.
November 13, 2013, from 9:00 a.m. to 3:00 p.m./Eastern Time.
December 18, 2013, from 9:00 a.m. to 3:00 p.m./Eastern Time.

For up-to-date information, go to the ONC Web site, *http://www.healthit.gov/faca.*

Contact Person: MacKenzie Robertson, Office of the National Coordinator, HHS, 355 E Street SW., Washington, DC 20201, 202–205–8089, Fax: 202–260–1276, email: *mackenzie.robertson@hhs.gov.* Please call the contact person for up-to-date information on these meetings. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice.

Agenda: The committee will hear reports from its workgroups and updates from ONC and other Federal agencies. ONC intends to make background material available to the public no later than two (2) business days prior to each meeting. If ONC is unable to post the background material on its Web site prior to a meeting, it will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on ONC's Web site after each meeting, at *http://www.healthit.gov/faca.*

Procedure: ONC is committed to the orderly conduct of its advisory committee meetings. Interested persons may present data, information, or views, orally or in writing, on issues pending before the Committee. Written submissions may be made to the contact person on or before two days prior to the Committee's meeting date. Oral comments from the public will be scheduled in the agenda. Time allotted for each presentation will be limited to three minutes. If the number of speakers requesting to comment is greater than can be reasonably accommodated during the scheduled public comment period, ONC will take written comments after each meeting until close of business on that day.

Persons attending ONC's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

ONC welcomes the attendance of the public at its advisory committee meetings. Seating is limited at the location, and ONC will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact MacKenzie Robertson at least seven (7) days in advance of the meeting.

Notice of this meeting is given under the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App. 2).

Dated: December 5, 2012.

MacKenzie Robertson,

FACA Program Lead, Office of Policy and Planning, Office of the National Coordinator for Health Information Technology.

[FR Doc. 2012–29822 Filed 12–10–12; 8:45 am]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Initial Review

The meeting announced below concerns Occupational Safety and Health Education and Research Centers (ERC) PAR 10–217, initial review.

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the aforementioned meeting:

Times and Dates:

8:00 a.m.–5:00 p.m., February 26, 2013 (Closed).

8:00 a.m.–5:00 p.m., February 27, 2013 (Closed).

8:00 a.m.–12:00 p.m., February 28, 2013 (Closed).

Place: Renaissance Atlanta Midtown Hotel, 866 W. Peachtree Street, NW., Atlanta, Georgia 30308, Telephone: (678) 412–2400.

Status: The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters To Be Discussed: The meeting will include the initial review, discussion, and evaluation of applications received in response to ''Occupational Safety and Health Education and Research Centers (ERC) PAR 10–217.''

Contact Person for More Information: George Bockosh, M.S., Scientific Review Officer, CDC/NIOSH, 626 Cochrans Mill Road, Mailstop P–05, Pittsburgh, Pennsylvania 15236, Telephone: (412) 386–6465; Joan Karr, Ph.D., Scientific Review Officer, CDC/NIOSH 1600 Clifton Road, Mailstop E–74, Atlanta, Georgia 30333, Telephone: (404) 498–2506.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: December 4, 2012.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2012–29908 Filed 12–10–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–D–0530]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Guidance on Medical Devices: The Pre-Submission Program and Meetings With FDA Staff

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by January 10, 2013.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–7285, or emailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 0910–NEW and Title: ''Medical Devices: The Pre-Submission Program and Meetings with FDA Staff.'' Also, include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Daniel Gittleson, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–5156, *Daniel.Gittleson@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Guidance on Medical Devices: Pre-Submission Program and Meetings with FDA Staff—(OMB Control Number 0910–NEW)

This guidance describes the Pre-Submission program for medical devices reviewed in the Center for Devices and Radiological Health (CDRH) and the Center for Biologics Evaluation and Research (CBER). The guidance provides recommendations regarding the information that should be submitted in a Pre-Submission Package and procedures that should be followed for meetings between CDRH and CBER staff and industry representatives or application sponsors. When approved by OMB, this guidance document will supersede ''Pre-IDE Program: Issues and Answers—Blue Book Memo D99–1'' dated March 25, 1999.

A Pre-Submission is defined as a formal written request from an applicant for feedback from FDA to be provided in the form of a formal written response or, if the manufacturer chooses, a meeting or teleconference in which the feedback is documented in meeting minutes. A Pre-Submission is appropriate when FDA's feedback on specific questions is necessary to guide product development and/or application preparation. The proposed collections of information are necessary to allow the Agency to receive Pre-Submission Packages in order to implement this voluntary submission program.

Over time, the FDA pre-investigational device exemption (pre-IDE) program evolved to include feedback on premarket approval (PMA) applications, humanitarian device exemption applications, and 510(k) submissions, as well as to address questions related to whether a clinical study requires submission of an IDE. During discussions with representatives of the medical device industry in the development of the Agency's recommendations for Medical Device User Fee Amendments 2012 (MDUFA III), both the industry and the Agency agreed that the Pre-Submission (formerly pre-IDE) process provided important additional transparency to the IDE and premarket review processes. In response, the Secretary's 2012 Commitment Letter to Congress (MDUFA III Commitment Letter) included FDA's commitment to institute a structured process for managing Pre-Submissions.

To fulfill the Secretary's commitment to the to industry, this final guidance: (1) Describes the Pre-Submission program (formerly the IDE program) for medical devices reviewed in CDRH and CBER; (2) assists device manufacturers and their representatives who seek meetings with the FDA by providing guidance and recommendations regarding information that should be included in a Pre-Submission Package; and (3) provides guidance as to the

procedures that CDRH and CBER intend to follow when industry representatives or application sponsors request a meeting with review staff.

In the **Federal Register** of July 13, 2012 (77 FR 41413), FDA published a notice of availability combined with a 60-day notice requesting public comment on the proposed collection of information. FDA received no PRA-related comments.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

FDA Center	Number of respondents	Annual frequency per response	Total annual responses	Hours per response	Total hours
CDRH	2,465	1	2,465	137	337,705
CBER	79	1	79	137	10,823
Total					348,528

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Respondents are medical device manufacturers subject to FDA's laws and regulations. FDA estimates that it will receive approximately 2,544 pre-submission packages annually. The Agency reached this estimate by reviewing the number of submissions received by the Agency under the Pre-IDE program over the past 10 years. Based on FDA's experience with the Pre-IDE program, FDA expects the Pre-Submission program to continue to be utilized as a viable program in the future and expects that the number of pre-submission packages will increase over its current rate and reach a steady state of approximately 2,544 submissions per year.

FDA estimates from past experience with the Pre-IDE program that the complete process involved with the program takes approximately 137 hours. This average is based upon estimates by FDA administrative and technical staff that is familiar with the requirements for submission of a Pre-Submission and related materials, have consulted and advised manufacturers on these requirements, and have reviewed the documentation submitted.

Therefore, the total reporting burden hours is estimated to be 348,528 hours.

TABLE 2—ESTIMATED ANNUAL REPORTING BURDEN [1]

Number of respondents	Total burden hours annualized	Hourly wage rate	Total cost annualized
2,544	137	$150	$52,279,200

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The average to industry per hour for this type of work is $150, resulting in a cost of $20,550 per respondent. The estimated submission cost of $20,550 multiplied by 2,544 submissions per year equals $52,279,200, which is the aggregated industry reporting cost annualized.

FDA's annual estimate of 2,544 submissions is based on experienced trends over the past several years. FDA's administrative and technical staffs, who are familiar with the requirements for current pre-submissions, estimate that an average of 137 hours is required to prepare a pre-submission. However, we recognize there is a variance in the preparation submission because of the vast and varying complexities of medical devices.

Dated: December 3, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–29788 Filed 12–10–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0304]

Susan F. Knott; Denial of Hearing; Final Debarment Order

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is denying a request for a hearing submitted by Susan F. Knott and is issuing an order under the Federal Food, Drug, and Cosmetic Act (the FD&C Act) debarring Knott for 2 years from providing services in any capacity to a person that has an approved or pending drug product application. FDA bases this order on a finding that Knott was convicted of a misdemeanor under Federal law for conduct relating to the regulation of a drug product under the FD&C Act and that the type of conduct underlying the conviction undermines the process for the regulation of drugs. In determining the appropriateness and period of Knott's debarment, FDA has considered the relevant factors listed in the FD&C Act. Knott has failed to file with the Agency information and analyses sufficient to create a basis for a hearing concerning this action.

DATES: The order is effective December 11, 2012.

ADDRESSES: Submit applications for termination of debarment to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: G. Matthew Warren, Office of Scientific Integrity, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993, 301–796–4613.

SUPPLEMENTARY INFORMATION:

I. Background

Section 306(b)(2)(B)(i)(I) of the FD&C Act (21 U.S.C. 335a(b)(2)(B)(i)(I)) permits FDA to debar an individual if it finds that the individual has been convicted of a misdemeanor under

Federal law for conduct relating to the regulation of drug products under the FD&C Act, and if FDA finds that the type of conduct that served as the basis for the conviction undermines the process for the regulation of drugs.

On August 11, 2009, in the U.S. district court for the northern district of New York, Knott pled guilty to a misdemeanor under the FD&C Act, namely misbranding a drug in violation of sections 301(k), 502(i)(3) and 303(a)(1) of the FD&C Act (21 U.S.C. 331(k), 352(i)(3), 333(a)(1)) and 18 U.S.C. 2. The basis for this conviction was conduct surrounding her role in the injection of patients seeking treatment with BOTOX/BOTOX Cosmetic (BOTOX) with a product, TRI-toxin, distributed by Toxic Research International, Inc. (TRI). BOTOX is a biological product derived from botulinum toxin type A that is manufactured by Allergan, Inc., and was approved by FDA for use on humans for the treatment of facial wrinkles in 1991.

According to the records of the criminal proceedings, Knott, in following a physician's instructions, ordered at least 31 vials of TRI-toxin, an unapproved drug product, which was represented by its distributor as ''Botulinum Toxin Type A.'' Knott, a supervisory nurse in the medical practice, then instructed other nurses on how to dilute the TRI-toxin for injection into patients in accordance with orders from one or more physicians.

Knott is subject to debarment based on a finding, under section 306(b)(2)(B)(i) of the FD&C Act: (1) That she was convicted of a misdemeanor under Federal law for conduct relating to the regulation of a drug product under the FD&C Act and (2) that the type of conduct underlying the conviction undermines the process for the regulation of drugs. By letter dated November 30, 2010, FDA notified Knott of its proposal to debar her for 2 years from providing services in any capacity to a person having an approved or pending drug product application. In a letter dated February 3, 2011, through counsel, Knott requested a hearing on the proposal. In her request for a hearing, Knott acknowledges her conviction under Federal law, as alleged by FDA. However, she argues that she should not be debarred for several reasons, including several related to the factual basis set forth in the proposal to debar.

We reviewed Knott's request for a hearing and find that Knott has not created a sufficient basis for a hearing. Hearings are granted only if there is a genuine and substantial issue of fact. Hearings will not be granted on issues of policy or law, on mere allegations, denials, or general descriptions of positions and contentions, or on data and information insufficient to justify the factual determination urged (see 21 CFR 12.24(b)).

The Chief Scientist has considered Knott's arguments and concludes that they are unpersuasive and fail to raise a genuine and substantial issue of fact requiring a hearing.

II. Arguments

In support of her hearing request, Knott first asserts that section 306(b)(2)(B)(i) of the FD&C Act does not apply to her because she was never involved in the approval or regulation of drug products, nor was the underlying conduct of her conviction related to those activities. During her criminal proceedings, however, Knott pled guilty to misbranding and causing the misbranding of a drug in violation of sections 301(k), 502(i)(3) and 303(a)(1) of the FD&C Act by causing TRI-toxin, a drug not approved for use, to be offered for sale as an approved drug product, BOTOX. This conduct clearly relates to the regulation of drugs under the FD&C Act because it was in direct violation of the FD&C Act. The conduct also undermined the process for the regulation of drugs in that it permitted an unapproved drug to be substituted for an approved drug without the knowledge of the patient. As a result, Knott is subject to debarment under section 306(b)(2)(B)(i).

Knott next contends that she pled guilty to a misdemeanor violation under section 303(a)(1) of the FD&C Act, which is a strict liability offense, and that thus there was no demonstration or admission of criminal intent or knowledge underlying her conviction. She argues that, because she was not aware her conduct violated the FD&C Act, the conduct underlying her conviction could not undermine the process for regulation of drugs and she should not be debarred.

With respect to Knott's assertion that her offense was strict liability, section 306(b)(2)(B)(i) of the FD&C Act specifically provides for the debarment of individuals convicted of Federal misdemeanors related to the regulation of drug products under the FD&C Act. Given that misdemeanor violations of the FD&C Act itself are strict liability offenses, it stands to reason that criminal intent is not a critical component to debar an individual under section 306(b)(2)(B)(i). The charge to which Knott pled guilty did not hinge on supervisory liability or a technical violation of the FD&C Act. The charge in the information to which she pled guilty alleged that she caused a drug to be misbranded by offering it for sale under the name of another drug, BOTOX. The criminal information further establishes that, over the course of 9 months, she took the affirmative steps of ordering the drug and assisting in the formulation of the drug for injection to at least 150 patients. That the charge did not require a showing of intent has little to no bearing on whether Knott should be debarred. An individual need not have criminal intent for his or her conduct to undermine the process for the regulation of drugs. Knott's conduct undermined the process for the regulation of drugs in that it permitted an unapproved drug to be substituted for an approved drug without the knowledge of the patient. Knott has not presented any genuine and substantial issues of fact with respect to whether the conduct underlying her conviction undermines the process for the regulation of drugs.

Finally, Knott argues that the considerations under section 306(c)(3) of the FD&C Act weigh against imposing debarment of any length or debarment beyond a minimal period and that FDA should exercise discretion and decline to debar her for that reason. As set forth in the proposal and summarized in this document, Knott pled guilty to a misdemeanor under the FD&C Act for her role in offering a drug under the name of another. Consistent with the proposal to debar, therefore, we find that the consideration in section 306(c)(3)(A) of the FD&C Act with respect to the nature and seriousness of the offense involved weighs in favor of debarring Knott for some period of time.

The record establishes that the medical practice of which Knott was a part ultimately took voluntary steps to mitigate the effect on the public health from its unlawful conduct (see section 306(c)(3)(C) of the FD&C Act). Moreover, the record reflects that she was merely following a physician's orders and that thus she did not serve a managerial role in the offense (see section 306(c)(3)(B) of the FD&C Act). Finally, it is undisputed that she had no previous criminal convictions related to matters within the jurisdiction of FDA (see section 306(c)(3)(F) of the FD&C Act). These considerations counterbalance the nature and seriousness of her offense sufficiently to warrant decreasing the period of debarment from 5 years to 2 years, as recommended in the proposal to debar.

III. Findings and Order

Therefore, the Chief Scientist, under section 306(b)(2)(B)(i)(I) of the FD&C

Act and under authority delegated to him by the Commissioner of Food and Drugs, finds: (1) That Knott has been convicted of a misdemeanor under Federal law for conduct relating to the development or approval of a drug product or otherwise relating to the regulation of a drug product under the FD&C Act and (2) that the conduct underlying the conviction undermines the process for the regulation of drugs. FDA has considered the relevant factors listed in section 306(c)(3) of the FD&C Act and determined that a debarment of 2 years is appropriate.

As a result of the foregoing findings, Knott is debarred for 2 years from providing services in any capacity to a person with an approved or pending drug product application under section 505, 512, or 802 of the FD&C Act (21 U.S.C. 355, 360b, or 382), or under section 351 of the Public Health Service Act (42 U.S.C. 262), effective (see **DATES**) (see 21 U.S.C. 335a(c)(1)(B), (c)(2)(A)(iii), and 321(dd)). Any person with an approved or pending drug product application, who knowingly uses the services of Knott, in any capacity during her period of debarment, will be subject to civil money penalties (section 307(a)(6) of the FD&C Act (21 U.S.C. 335b(a)(6))). If Knott, during her period of debarment, provides services in any capacity to a person with an approved or pending drug product application, she will be subject to civil money penalties (section 307(a)(7) of the FD&C Act). In addition, FDA will not accept or review any abbreviated new drug applications submitted by or with the assistance of Knott during her period of debarment (section 306(c)(1)(B) of the FD&C Act).

Any application by Knott for termination of debarment under section 306(d) of the FD&C Act should be identified with Docket No. FDA–2010–N–0304 and sent to the Division of Dockets Management (see **ADDRESSES**). All such submissions are to be filed in four copies. The public availability of information in these submissions is governed by 21 CFR 10.20(j).

Publicly available submissions may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday. Persons with access to the Internet may obtain documents in the Docket at *http://www.regulations.gov/.*

Dated: November 29, 2012.

Jesse L. Goodman,

Chief Scientist.

[FR Doc. 2012–29782 Filed 12–10–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Statement of Organization, Functions and Delegations of Authority

This notice amends Part R of the Statement of Organization, Functions and Delegations of Authority of the Department of Health and Human Services (HHS), Health Resources and Services Administration (HRSA) (60 FR 56605, as amended November 6, 1995; as last amended at 77 FR 65694–65698 dated October 30, 2012).

This notice reflects organizational changes to the Health Resources and Services Administration. This notice updates the functional statement for the Bureau of Clinician Recruitment and Service (BCRS) (RU). Specifically, this notice: (1) Updates the functional statement for the Division of Program Operations (RU9).

Chapter RU—Bureau of Clinician Recruitment and Service

Section RU–20, Functions

Delete the functional statement for the Division of Program Operations (RU9) and replace in its entirety.

Division of Program Operations (RU9)

Serves as the organizational focal point for the Bureau's centralized, comprehensive customer service function to support program participants and oversee participants' compliance with all BCRS programs. Provides regular and ongoing communication, technical assistance, and support to program participants through the period of obligated service and closeout. Specifically: (1) Initiates contact with and monitors program participants throughout their service; (2) manages participants' site transfers, in-service verifications, and similar service change requests; (3) reviews program cases and recommends participants for suspensions, waivers, and defaults to the appropriate BCRS Division; (4) conducts closeout activities and issues completion certificates to participants that fulfill their service obligation; (5) manages the 6-month verification process; and, (6) maintains program participants' case files in the Bureau's management information system.

Section R–30, Delegations of Authority

All delegations of authority and re-delegations of authority made to HRSA officials that were in effect immediately prior to this reorganization, and that are consistent with this reorganization, shall continue in effect pending further re-delegation.

This reorganization is effective upon date of signature.

December 4, 2012.

Mary K. Wakefield,

Administrator.

[FR Doc. 2012–29862 Filed 12–10–12; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Review; Comment Request

SUMMARY: Under the provisions of Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the Clinical Center, the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below. This proposed information collection was previously published in the **Federal Register** on July 13, 2012, page 41431 and allowed 60-days for public comment. No public comments were received. The purpose of this notice is to allow an additional 30 days for public comment. The National Institutes of Health may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Proposed Collection: Title: The Impact of Clinical Research Training and Medical Education at the Clinical Center on Physician Careers in Academia and Clinical Research. *Type of Information Collection Request:* Reinstatement with Change; OMB Control Number: 0925–0602; *Need and Use of Information Collection:* This study will assess the value of the training programs administered by the Office of Clinical Research Training and Medical Education. The primary objective of the survey is to determine if training programs have had an impact on whether the trainees are performing clinical research, hold an academic appointment, have National Institutes of Health funding sources as well as to obtain information from the trainees as to what part of the National Institutes of Health medical education program they feel could be improved upon, the quality of the mentoring program, and how their National Institutes of Health training has contributed to their current clinical competence. *Frequency of*

Response: On occasion. *Affected Public:* Individuals and businesses. *Type of Respondents:* Physicians and dentists, Ph.D. medical scientists, medical students, dental students, post-baccalaureate students, graduate students, post-doctoral students, and other health care professionals. The estimated annualized burden hours are as follows:

Type of respondents	Estimated number of respondents	Number of responses per respondent	Average hours per response	Total annual burden hours requested
Doctoral Level	354	1	20/60	118
Students	403	1	20/60	134
Other	28	1	20/60	9
Total	785			261

Request for Comments: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Direct Comments To OMB: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, OIRA_submission@omb.eop.gov or by fax to 202–395–6974, Attention: Desk Officer for NIH. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Robert M. Lembo, MD, Office of Clinical Research Training and Medical Education, NIH Clinical Center, 10 Center Drive/1N252, Bethesda, MD 20892–1352, or call non-toll-free number (301) 496–2636 or Email your request, including your address to: *lembor@cc.nih.gov*.

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 30-days of the date of this publication.

Dated: November 30, 2012.

Laura Lee,

Project Clearance Liaison, Warren Grant Magnuson Clinical Center, National Institutes of Health.

[FR Doc. 2012–29905 Filed 12–10–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Cognition and Aging.

Date: January 7, 2013.

Time: 3:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Weijia Ni, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3184, MSC 7848, Bethesda, MD 20892, (301) 237–9918, *niw@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Integrative, Functional, and Cognitive Neuroscience Member Conflicts: Hearing and Taste.

Date: January 8, 2013.

Time: 8:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: John Bishop, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5182, MSC 7844, Bethesda, MD 20892, (301) 408–9664, *bishopj@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 5, 2012.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–29861 Filed 12–10–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Eye Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Eye Institute Special Emphasis Panel; NEI Clinical Trial Applications.

Date: January 30, 2013.

Time: 3:00 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5635 Fishers Lane, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Brian Hoshaw, Ph.D., Scientific Review Officer, ivision of Extramural Research, National Eye Institute, National Institutes of Health, 5635 Fishers Lane, Suite 1300, MSC 9300, 301–451–2020, *hoshawb@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.867, Vision Research, National Institutes of Health, HHS)

Dated: December 5, 2012.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–29860 Filed 12–10–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; Small Grants for Behavioral Research in Cancer Control.

Date: January 9–10, 2013.

Time: 10:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health 6120 Executive Boulevard, Room 511 Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Gerald G. Lovinger, Ph.D., Scientific Review Administrator, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Boulevard, Room 8101, Bethesda, MD 20892–8329, 301/496–7987, *lovingeg@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; SPORE I.

Date: February 6–7, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, Montgomery County Conference Center Facility, 5701 Marinelli Road, North Bethesda, MD 20852.

Contact Person: Caron A. Lyman, Ph.D., Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Boulevard, Room 8119, Bethesda, MD 20892–8328, 301–451–4761, *lymanc@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Quantitative Imaging for the Evaluation of Responses to Cancer Therapies.

Date: February 12, 2013.

Time: 12:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6116 Executive Boulevard, Room 210, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Kenneth L. Bielat, Ph.D., Scientific Review Officer, Special Review Logistics Branch, Division Of Extramural Activities, National Cancer Institute, 6116 Executive Boulevard, Room 7147, Bethesda, MD 20892–8329, 301–496–7576, *bielatk@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Core Infrastructure and Methodological Research for Cancer Epidemiology Cohorts.

Date: February 15, 2013.

Time: 11:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6116 Executive Boulevard, Room 707, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Kenneth L. Bielat, Ph.D., Scientific Review Officer, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Boulevard, Room 7147, Bethesda, MD 20892–8329, 301–496–7576, *bielatk@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Omnibus R03/R21: Therapeutics.

Date: February 27–28, 2013.

Time: 7:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Express, 1775 Rockville Pike, Rockville, MD 20852.

Contact Person: Robert Bird, Ph.D., Chief, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Boulevard, Room 8113, Bethesda, MD 20892–8328, 301–496–7978, *birdr@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: December 5, 2012.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–29864 Filed 12–10–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel; Studies to Evaluate Early Life Exposure.

Date: January 17, 2013.

Time: 10:00 a.m. to 5:30 p.m.

Agenda: To review and evaluate contract proposals.

Place: NIEHS/National Institutes of Health, Keystone Building, 530 Davis Drive, Research Triangle Park, NC 27709, (Telephone Conference Call).

Contact Person: RoseAnne M McGee, Associate Scientific Review Officer, Scientific Review Branch, Division of Extramural Research and Training, Nat. Institute of Environmental Health Sciences, P.O. Box 12233, MD EC–30, Research Triangle Park, NC 27709, (919) 541–0752, *mcgee1@niehs.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: December 5, 2012.

Carolyn A. Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–29660 Filed 12–10–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Comments are invited on: (a) Whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Proposed Project: Monitoring of National Suicide Prevention Lifeline (OMB No. 0930–0274)—Revision

This proposed project renewal includes the continuation of previously approved data collection activities Monitoring of National Suicide Prevention Lifeline Form (OMB No. 0930–0274) in an effort to advance the understanding of crisis hotline utilization and its impact. Out of the previously approved 11 data collection instruments and consents, only 6 will be utilized through this revision. The Substance Abuse and Mental Health Services Administration's (SAMHSA), Center for Mental Health Services (CMHS) funds a National Suicide Prevention Lifeline Network, consisting of a toll-free telephone number that routes calls from anywhere in the United States to a network of local crisis centers. In turn, the local centers link callers to local emergency, mental health, and social service resources.

The overarching purpose of the proposed Monitoring of National Suicide Prevention Lifeline— Revision is to examine the impact of motivational training and safety planning (MI/SP) with callers who have expressed suicidal desire (i.e., follow-up interviews with callers and counselors). In total this effort includes three data collection instruments and three associated data collection consents.

Clearance is being requested to *continue the previously approved data collection activities* to continue caller and counselor follow-up assessment activities which will examine the process and impact of motivational training and safety planning (MI/SP) with callers who have expressed suicidal ideation. The data collected through the renewal of these data collection activities will ultimately help SAMHSA to understand and direct their crisis hotline lifesaving initiatives. The data collection activities are enumerated below.

Funded crisis centers will train counselors to implement an intervention with callers during the initial call to a center, which incorporates aspects of motivational interviewing and safety planning (MI/SP) and utilizes an evidence-based practice model to provide follow-up to callers who have expressed a suicidal desire. An assessment of MI/SP fidelity and process measures will be incorporated into the design through the administration of two self-administered questionnaires to crisis center counselors. The impact assessment of MI/SP counselor training will include follow-up telephone interviews with callers to assess their emotions and behaviors following their interaction with the MI/SP trained counselor.

(1) The MI/SP Counselor Attitude Questionnaire attitude questionnaire will be administered to counselors at the conclusion of their MI/SP training and be used as a possible predictor of fidelity of the MI/SP intervention. Information to be gathered includes (a) counselors' views of the applicability of the MI/SP for preparing them to conduct safety planning and follow up with callers; (b) possible anticipated challenges (i.e., impeding factors) to applying the MI/SP training in their centers; (c) the relationship of the MI/SP model to their centers; (d) the extent to which trainees are provided with or obtain adequate resources to enable them to use MI/SP on the job; (e) impeding and facilitating factors; and (f) attitudes about counselors' self-efficacy to use MI/SP and views on its utility. It is expected that a total of 750 counselors will be trained over the course of 3 years in an effort to maintain 175 counselors at any given time. Thus, a total of 750 counselors are expected to complete this questionnaire during the 3-year data collection period. Prior to collecting data from counselors, crisis counselors must have read and signed the MI/SP Counselor Consent. This form explains the purpose of the data collection, privacy, risks and benefits, what the data collection entails, and participant rights. It is anticipated that 750 consents and questionnaires will be collected by crisis counselors during the 3-year data collection period.

(2) At the end of the call and once the counselor deems the intervention to be complete, counselors will ask all appropriate callers, using the MI/SP Caller Initial Script, for permission to be re-contacted by research staff for a follow-up interview. Counselors will state that the caller *may* be contacted by the research team if randomly selected for a follow-up call. A total of 1,500 callers across the 3-year data collection period will be provided with the MI/SP Caller Initial Script for their consent to be contacted at a later time.

(3) Counselors will be asked to complete the MI/SP Counselor Follow-up Questionnaire for each call that is eligible. The questionnaire will incorporate an assessment of the outreach, telephonic follow up and/or other strategies that the center has proposed to implement, and whether the counselor was able to implement the center's site plan as originally conceived. The questionnaire will also include items on the demographic characteristics of the caller, whether contact was successfully made with the caller, whether the caller followed through with the safety plan and/or referral given by the counselor, whether MI/SP was re-implemented during the follow-up contact, whether another follow-up is scheduled, the educational and crisis experience of the person attempting re-contact with the caller, and that person's prior experience with follow-up. Barriers to implementing the follow-up, as well as types of deviation from the site's follow-up plan will also be assessed. Open-ended questions about what led to deviations from the site's follow-up plan will also be included. In total, it is expected that counselors will complete 3,750 questionnaires across the 3-year data collection period.

(4) Researchers will begin conducting follow-up interviews with callers

approximately 6 weeks after the initial call to the center. This follow-up telephone interview (MI/SP Caller Follow-up Interview) will be conducted to collect information on demographic characteristics, gather caller feedback on the initial call made to the center, suicide risk status at the time of and since the call, current depressive symptomatology, follow through with the safety plan and referrals made by the crisis counselor, and barriers to service. Prior to collecting information during the MI/SP Caller Follow-up Interview, researchers will read callers the MI/SP Caller Follow-up Consent Script. Taking into account attrition and the number of callers who do not give consent, it is expected that the total number of follow-up interviews conducted by the research team will not exceed 1,107.

The estimated response burden to collect this information is as follows annualized over the requested 3-year clearance period is presented below:

ANNUALIZED AVERAGES: RESPONDENTS, RESPONSES AND HOURS

Instrument	No. of respondents	No. of responses per Respondent*	Total number of responses	Burden/ response (hours)	Annual burden* (hours)
MI/SP Caller Initial Script	500	1	500	.08	40
MI/SP Caller Follow-up Consent Script	369	1	369	.17	63
MI/SP Caller Follow-up Interview	369	1	369	.67	247
MI/SP Counselor Consent	250	1	250	.08	20
MI/SP Counselor Attitudes Questionnaire	250	1	250	.25	63
MI/SP Counselor Follow-up Questionnaire	250	5	1250	.17	213
Total	1,988				646

* Rounded to the nearest whole number.

Send comments to Summer King, SAMHSA Reports Clearance Officer, Room 2–1057, One Choke Cherry Road, Rockville, MD 20857 *AND* email her a copy at *summer.king@samhsa.hhs.gov*. Written comments should be received within 60 days of this notice.

Summer King,

Statistician.

[FR Doc. 2012–29825 Filed 12–10–12; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2012–0041]

Response to Comments Received for the ''The Menlo Report: Ethical Principles Guiding Information and Communication Technology Research'' (''The Menlo Report'') for the Department of Homeland Security (DHS), Science and Technology, Cyber Security Division (CSD), Protected Repository for the Defense of Infrastructure Against Cyber Threats (PREDICT) Project

AGENCY: Science and Technology Directorate, DHS.

ACTION: Response.

SUMMARY: The Department of Homeland Security (DHS), Science and Technology (S&T) published a 60-day public notice in the **Federal Register** on December 28, 2011 (**Federal Register** Volume 76, Number 249, Docket No. DHS–2011–0074) to invite public comment on the Menlo Report. The intent of the notice was to further refine the content of the Menlo Report beyond the working group that had generated the report. This notice responds to the comments received during this 60-day public notice.

ADDRESSES: The updated Menlo Report may be found at *http://www.cyber.st.dhs.gov/.*

FOR FURTHER INFORMATION CONTACT: DHS S&T, Email *Menlo_Report@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

A grassroots working group composed of stakeholders in information and communication technology research (ICTR), with support from the Homeland Security Advanced Research Projects Agency (HSARPA) CSD, developed the Menlo Report. HSARPA CSD published this report in the **Federal Register** in December 2011 (76 FR 81517, Docket No. DHS–2011–0074) to invite public comment, and sixteen comments were received. The complete text of the public comments and the **Federal Register** notice are available on the Regulations.gov web site at *http://www.regulations.gov/#!docketDetail;D=DHS-2011-0074.*

To address the comments, a subset of the initial working group was assembled that has stewarded the document since its inception. In summary, the comments contained both laudatory and critical remarks and covered issues that ranged in scope from targeted to general. The approach to absorbing this valuable feedback was to analyze each comment, distill the issue(s) raised by the commenter, reflect on the relevant text in the Menlo Report, and generate a response. Those responses entailed identifying proposed changes intended to resolve the issues raised, either by modifying text that was unclear or misinterpreted by readers or by accepting constructive criticism.

Changes to the Report

The Menlo Report has been updated and is available at *http://www.cyber.st.dhs.gov/.* Overall, the changes to the Menlo Report based on the comments are summarized as follows:

1. The next version will clarify that the Menlo Report is not an official policy statement of DHS and that DHS does not have the intention or authority to permit researchers to engage in any practice in the name of ''ethical research.''

2. The next version will reflect that the main focus of the Menlo Report is on private sector and academic researchers who may be government funded, rather than DHS employees. While the Menlo Report may certainly be applicable to government researchers, it is not intended to conflict with or preempt statutory or regulatory requirements placed on government employees.

3. The next version will explicitly address the choice of Belmont Report model instead of an alternative ethical framework (i.e., a Belmont Report principles-in-context approach). Specifically, the next version of the Menlo Report will clarify the benefit to society versus the risks to research subjects under this model.

4. The next version will address the relationship between law and ethics, (i.e., when a researcher's ethically-derived beliefs are in direct conflict with relevant laws) by stating it is beyond the scope of the Menlo Report to advocate a position when laws directly conflict with ethics. Rather, the Menlo Report reinforces the principle that ethics plays a role in closing gaps in laws and clarifying grayness in interpretation of laws.

5. The next version will highlight the value of the Menlo Report guidelines to society rather than just researchers.

Detailed Comments and Responses

S&T published a 60-day public notice in the **Federal Register** on December 28, 2011 (**Federal Register** Volume 76, Number 249, Docket No. DHS–2011–0074) to invite public comment on the Menlo Report. The notice helped further refine the content of the Menlo Report by seeking comments on the document generated by the working group. At the end of the 60-day comment period, S&T received sixteen comments from two universities, four private citizens, three non-profit organizations, one foreign university, and one professional association. In general, the comments received fall into the following categories:

1. The Menlo Report construed as official DHS policy
2. Interpretation of informed consent
3. Researcher interaction with a research subject's computer
4. Calculating benefits and harms
5. Estimation of benefits and harms from ICTR
6. Applicability of the Institutional Review Board (IRB) model for ethical review of ICTR
7. The relationship between laws and ethics
8. Privacy rights of individuals related to corporate monitoring
9. Ethical considerations for future contemplation and study
10. Standalone comments

A. The Menlo Report As Official DHS policy

Several comments stated that the Menlo Report is an official policy statement of DHS and that DHS has the intention or authority to permit researchers to engage in any practice in the name of ''ethical research.''

Response: The Menlo Report offers ethical guidance for public and private researchers and explicitly advocates respect for the law and public interest (e.g., supporting the notion that different laws may apply to government researchers) and is neither an official nor authoritative policy statement for DHS or law enforcement. As a result, modifications to the Menlo Report will have additional, explicit language to indicate that while DHS supports the Menlo Report, the Menlo Report does not represent official agency policy nor should it be interpreted as applying to, conflicting with, or superseding statutory mandates and other authoritative commitments governing actions by the government.

B. Interpretation of Informed Consent

Several comments were received related to the discussion of informed consent in the Menlo Report.

Response: Support for informed consent will be conveyed by the Menlo Report byh detailing how researchers and Research Ethics Boards (REB) should consider the situation where waivers of informed consent are sought. Modifications to the Menlo Report will substitute the term ''proxy'' with the Common Rule term ''legally authorized representative,'' clarify the issue of their relationship to requests for waivers, and better balance the perspective between that of researchers and that of end-users or research subjects. The respondents agree with the observation in various comments regarding ICTR and waivers to informed consent and will highlight this issue in modifications to the Menlo Report. Given the gravity and ubiquity of cyber-crime, the benefits and importance of accurate research data for countering it is a specific situation that may satisfy the requirements of 45 CFR 46.116 allowing requests for alteration or elimination of informed consent requirements in those situations where minimal risk to subjects (or those reliant on information and communication technology (ICT) under study) exists.

C. Researcher Interaction With a Research Subject's Computer

Multiple comments dealt with the issue of interacting with a research subject's computer or interacting with malicious software under study that the owner of the computer is not even aware exists on their computer.

Response: It is understood that the study of malicious software, to include botnets, is an area that can pose greater than minimal risk to those who rely on infected computers. Ultimately, the issue of what constitutes ''minimal risk,'' and also whether it is ''human subjects research'' to interact with the computer, as opposed to the human, must be determined. Given that IRB in the United States today do not require that researchers adhere to zero-risk, but rather they are guided by requirements of 45 CFR 46.111, the Menlo Report will be updated to clarify the justification for this approach by illuminating the consequences of a zero-risk tolerance approach, noting, for example, how it would negatively impact the public's ability to benefit from research.

D. Calculating Benefits and Harms

Various comments received also raised issues regarding the estimation of benefits and harms from ICTR, including not only who may be harmed but also how potential benefits and harms can be quantified.

Response: The current ''Identifying Harms'' section of the Menlo Report addresses concerns about lack of comprehensive coverage of harms. However, to bolster this area, the Menlo Report will be updated to address the potential, rather than certainty, of harms resulting from research activities. Specifically, personal privacy and information confidentiality and integrity are uncontrovertibly noted as potential harms that must be addressed. Updates will also clarify the distinction and relevance of the benefit to society versus the risks to research subjects in ICTR. The respondents will also change the text to include harms resulting from notification of research, and publication of information that can be used to cause harm. Additional verbiage will also seek to clarify the distinction and relevance of the benefit to society versus the risks to research subjects in ICTR.

E. Applicability of the Institutional Review Board (IRB) Model

Several comments raised the appropriateness of the Belmont/IRB model, related to both behavioral and biomedical research, for ethical review of ICTR.

Response: The purpose of the Menlo Report is to advocate principles and applications, not to define enforcement mechanisms. The crux of these comments related to applicability of the Belmont Report. The next version of the Menlo Report will concretely state that it is deliberately founded on the Belmont model, which was originally developed for the biomedical research context but is not limited to biomedicine, as evidenced by the fact that this model is currently used for evaluation of behavioral research (including that which involves ICT).

F. Relationship Between Laws and Ethics

Many comments were received relating to conflicts between ethical codes and the law.

Response: The comments were diverse but converged on the necessity to add text regarding the relationship between law and ethics. The assertion

that the Menlo Report precludes the Common Rule is conjecture that appeared in one of the comments, and it is important to mention that this is not substantiated by evidence from the Menlo Report. This criticism does not reflect what is presently allowed by the Common Rule in terms of waivers (see 45 CFR 46.116, specifically subsections (c) and (d)). The Menlo Report currently is framed in such a way as to be congruous with the predominant REB model in the United States, IRB. The Menlo Report will be revised to include text that clarifies that the Menlo Report does not take any stance on addressing the situation when laws are viewed by the public to be unethical. It was also apparent from the comments that the Menlo Report needs to clarify that researchers are not authorized to waive consent. The Menlo Report will also be updated in the Respect for Law and Public Interest section to address conflicts with principles of compliance, transparency, and accountability and with the privacy interests of individuals.

G. Privacy of Individuals vs. Corporations

Multiple comments highlighted a problem regarding the discussion on the privacy of an organization in relation with enhancing cyber security.

Response: This discussion will be removed from the next version of the Menlo Report. The comments correctly indentified a potential inconsistency.

H. Ethical Considerations for Future Contemplation and Atudy

Finally, there were comments suggesting a general call for further study and engagement with various communities and agencies in order to create workable guidance.

Response: Much additional work will be done as a follow on to the Menlo Report to spur additional discussion of the approach to ethics in ICTR presented in the Menlo Report. Some of this research has already been undertaken and is included in a companion report to the Menlo Report.

I. Standalone Comments

There were several comments that did not fall into the preceding categories but did spur further changes to the Menlo Report. The following will be reflected as updates to the Menlo Report:

1. A clarification will be added explaining that while the Menlo Report adopts Belmont Report principles and the Common Rule regime in framing the principles and applications for evaluating and applying ethics in ICTR, it also highlights areas within the Common Rule that are more frequently exercised by ICTR or that may cause problems in applying it to ICTR.

2. Language to more clearly discuss how to make inclusion/exclusion decisions in conformance with Justice and Equity considerations will be added.

3. In general, the revised Menlo Report will take a well-rounded perspective to include the end-user perspective, in addition to a researcher-centric perspective.

4. The discussion of the existence and management of pre-existing data will be expanded.

5. The discussion regarding the creation of the Internet and its growth to include the hosting databases with personally identifiable information will be clarified.

6. The description or context of the use of the term ''reasonable researcher'' will be updated.

7. Explanatory language to address the issue of record retention will be included in the Mitigation of Realized Harms section.

8. The term ''evidence-based consideration'' will be clarified.

Dated: November 30, 2012.

Tara O'Toole,

Under Secretary for Science and Technology.

[FR Doc. 2012–29818 Filed 12–10–12; 8:45 am]

BILLING CODE 9110–9F–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Deferral of Duty on Large Yachts Imported for Sale

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 30-Day notice and request for comments; extension of an existing collection of information: 1651–0080.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act: Deferral of Duty on Large Yachts Imported for Sale. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with no change to the burden hours or to the information collected. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (77 FR 60133) on October 2, 2012, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before January 10, 2013.

ADDRESSES: Interested persons are invited to submit written comments on this proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 799 9th Street NW., 5th Floor, Washington, DC 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual cost burden to respondents or record keepers from the collection of information (a total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Deferral of Duty on Large Yachts Imported for Sale.

OMB Number: 1651–0080.

Form Number: None.

Abstract: This collection of information is required to ensure compliance with 19 U.S.C. 1484b which provides that an otherwise dutiable yacht that exceeds 79 feet in length, is used primarily for recreation or pleasure, and had been previously sold by a manufacturer or dealer to a retail customer, may be imported without the payment of duty if the yacht is imported with the intention to offer for sale at a boat show in the United States. The statute provides for the deferral of payment of duty until the yacht is sold but specifies that the duty deferral period may not exceed 6 months. This collection of information is provided for by 19 CFR 4.94 which requires the submission of information to CBP such as the name and address of the owner of the yacht, the dates of cruising in the waters of the United States, information about the yacht, and the ports of arrival and departure.

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses and Individuals.

Estimated Number of Respondents: 50.

Estimated Number of Total Annual Responses: 50.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 50.

Dated: December 6, 2012.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2012–29838 Filed 12–10–12; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Declaration for Free Entry of Returned American Products

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 30-Day notice and request for comments; extension of an existing collection of information: 1651–0011.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act: Declaration for Free Entry of Returned American Products (CBP Form 3311). This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with no change to the burden hours or to the information collected. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (77 FR 58564) on September 21, 2012, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before January 10, 2013.

ADDRESSES: Interested persons are invited to submit written comments on this proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 799 9th Street NW., 5th Floor, Washington, DC 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual cost burden to respondents or record keepers from the collection of information (a total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Declaration of Free entry of Returned American Products.

OMB Number: 1651–0011.

Form Number: CBP Form 3311.

Abstract

CBP Form 3311, *Declaration for Free Entry of Returned American Products,* is used by importers and their agents when duty-free entry is claimed for a shipment of returned American products under the Harmonized Tariff Schedules of the United States. This form serves as a declaration that the goods are American made and that (a) they have not been advanced in value or improved in condition while abroad, (b) were not previously entered under a Temporary Importation Under Bond provision, and (c) drawback was never claimed and/or paid. CBP Form 3311 is authorized by 19 CFR 10.1, 10.5, 10.6, 10.66, 10.67, 12.41, 123.4, 142.11, 143.21, 143.23, 143.25 and is accessible at. *http://forms.cbp.gov/pdf/CBP_Form_3311.pdf.*

Action

CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to CBP Form 3311.

Type of Review: Extension (without change).

Affected Public: Businesses.

Estimated Number of Respondents: 12,000.

Estimated Number of Responses per Respondent: 35.

Estimated Number of Total Annual Responses: 420,000.

Estimated Time per Response: 6 minutes.

Estimated Total Annual Burden Hours: 42,000.

Dated: December 6, 2012.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2012–29837 Filed 12–10–12; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLOR957000–L63100000–HD0000–13XL1165AF: HAG13–0072]

Filing of Plats of Survey: Oregon/Washington

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The plats of survey of the following described lands are scheduled to be officially filed in the Bureau of Land Management, Oregon State Office, Portland, Oregon, 30 days from the date of this publication.

Willamette Meridian

Oregon

T. 15 S., R. 27 E, accepted November 16, 2012.
T. 5 S., R. 3 E., accepted November 16, 2012.
T. 27 ½ S., R. 8 W., accepted November 27, 2012.
T. 39 S., R. 4 W., accepted November 27, 2012.
T. 40 S., R. 7 E., accepted November 27, 2012.

ADDRESSES: A copy of the plats may be obtained from the Public Room at the Bureau of Land Management, Oregon State Office, 333 SW. 1st Avenue, Portland, Oregon 97204, upon required payment.

FOR FURTHER INFORMATION CONTACT: Kyle Hensley, (503) 808–6132, Branch of Geographic Sciences, Bureau of Land Management, 333 SW. 1st Avenue, Portland, Oregon 97204. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: A person or party who wishes to protest against this survey must file a written notice with the Oregon State Director, Bureau of Land Management, stating that they wish to protest. A statement of reasons for a protest may be filed with the notice of protest and must be filed with the Oregon State Director within thirty days after the protest is filed. If a protest against the survey is received prior to the date of official filing, the filing will be stayed pending consideration of the protest. A plat will not be officially filed until the day after all protests have been dismissed or otherwise resolved. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Mary J.M. Hartel,

Chief Cadastral Surveyor of Oregon/Washington.

[FR Doc. 2012–29875 Filed 12–10–12; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

Notice of Proposed Information Collection; Request for Comments

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Office of Surface Mining Reclamation and Enforcement (OSM) is announcing its intention to request approval to continue the collection of information for one of its Technical Training Program forms: Nomination and Request for Payment. This information collection activity was previously approved by the Office of Management and Budget (OMB), and assigned control number 1029–0120.

DATES: Comments on the proposed information collection activity must be received by February 11, 2013, to be assured of consideration.

ADDRESSES: Comments may be mailed to John A. Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave. NW., Room 203–SIB, Washington, DC 20240. Comments may also be submitted electronically to *jtrelease@osmre.gov.*

FOR FURTHER INFORMATION CONTACT: To receive a copy of the information collection request, contact John Trelease, at (202) 208–2783 or by email.

SUPPLEMENTARY INFORMATION: OMB regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities [see 5 CFR 1320.8 (d)]. This notice identifies an information collection that OSM will be submitting to OMB for renewed approval. This collection is for the OSM Technical Training Nomination and Request for Payment Form (OSM–105). OSM will request a 3-year term of approval for this information collection activity.

Comments are invited on: (1) The need for the collection of information for the performance of the functions of the agency; (2) the accuracy of the agency's burden estimates; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the information collection burden on respondents, such as use of automated means of collection of the information. A summary of the public comments will accompany OSM's submission of the information collection request to OMB.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Title: Nomination and Request for Payment Form for OSM Technical Training Courses.

OMB Control Number: 1029–0120.

Summary: The information is used to identify and evaluate the training courses requested by students to enhance their job performance, to calculate the number of classes and instructors needed to complete OSM's technical training mission, and to estimate costs to the training program.

Bureau Form Numbers: OSM–105.

Frequency of Collection: Once for each training course.

Description of Respondents: State and Tribal regulatory and reclamation employees and industry personnel.

Total Annual Responses: 944 responses.

Total Annual Burden Hours: 5 minutes per respondent, or 79 total hours.

Dated: December 4, 2012.

Andrew F. DeVito,

Chief, Division of Regulatory Support.

[FR Doc. 2012–29649 Filed 12–10–12; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

Notice of Proposed Information Collection; Request for Comments

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Office of Surface Mining Reclamation and Enforcement (OSM) is announcing its intention to request continued approval for the collection of information for 30 CFR Part 882—Reclamation on Private Land. This Part of the regulation establishes procedures for recovery of the cost of reclamation activities conducted on private property. OSM, the State, or the Indian tribe has the discretionary authority to appraise the land and place or waive a lien against land reclaimed by the regulatory authority if the reclamation results in a significant increase in the fair market value. Responses are required to obtain a benefit.

This information collection activity was previously approved by the Office of Management and Budget (OMB) and assigned control number 1029–0057.

DATES: Comments on the proposed information collection must be received by February 11, 2013, to be assured of consideration.

ADDRESSES: Comments may be mailed to John A. Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave. NW., Room 203–SIB, Washington, DC 20240. Comments may also be submitted electronically to *jtrelease@osmre.gov.*

FOR FURTHER INFORMATION CONTACT: To receive a copy of the information collection request, contact John Trelease, at (202) 208–2783 or by email at *jtrelease@osmre.gov.*

SUPPLEMENTARY INFORMATION: OMB regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities [see 5 CFR 1320.8(d)]. This notice identifies an information collection that OSM will be submitting to OMB for approval. The collection is contained in 30 CFR Part 882—Reclamation on Private Lands. OSM will request a 3-year term of approval for this information collection activity.

Comments are invited on: (1) The need for the collection of information for the performance of the functions of the agency; (2) the accuracy of the agency's burden estimates; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the information collection burden on respondents, such as use of automated means of collection of the information. A summary of the public comments will accompany OSM's submission of the information collection request to OMB.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Title: 30 CFR Part 882—Reclamation on Private Lands.

OMB Control Number: 1029–0057.

Summary: Public Law 95–87 authorizes Federal, State, and Tribal governments to reclaim private lands and allows for the establishment of procedures for the recovery of the cost of reclamation activities on privately owned lands. These procedures are intended to ensure that governments have sufficient capability to file liens so that certain landowners will not receive a windfall from reclamation.

Bureau Form Number: None.

Frequency of Collection: Once.

Description of Respondents: State governments and Indian tribes.

Total Annual Responses: 1.

Total Annual Burden Hours: 120.

Dated: December 4, 2012.

Andrew F. DeVito,

Chief, Division of Regulatory Support.

[FR Doc. 2012–29648 Filed 12–10–12; 8:45 am]

BILLING CODE 4310–05–M

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–894 (Second Review)]

Ammonium Nitrate From Ukraine; Notice of Revised Schedule of the Five-year Review Concerning the Antidumping Duty Order on Ammonium Nitrate From Ukraine

AGENCY: United States International Trade Commission.

ACTION: Notice.

DATES: *Effective Date:* December 4, 2012.

FOR FURTHER INFORMATION CONTACT: Jennifer Merrill (202–205–3188), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://www.usitc.gov*). The public record for this review may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION: On October 17, 2012, the Commission established a schedule for the conduct of the 5-year review of Ammonium Nitrate from Ukraine (77 FR 65015, October 24, 2012). The Commission is revising its schedule as follows: the prehearing briefs are due on March 20, 2013, the prehearing conference will be on April 1, 2013, the hearing will be on April 4, 2013, and the posthearing briefs and non-party written statements are due on April 15, 2013.

For further information concerning this review see the Commission's notice cited above.

Authority: This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.

Issued: December 5, 2012.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2012–29824 Filed 12–10–12; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–482–484 and 731–TA–1191–1194 (Final)]

Circular Welded Carbon-Quality Steel Pipe From India, Oman, The United Arab Emirates, and Vietnam

Determinations

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (Commission) determines, pursuant to sections 705(b) and 735(b) of the Tariff

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

Act of 1930 (19 U.S.C. 1671d(b)) and (19 U.S.C. 1673d(b)) (the Act), that an industry in the United States is not materially injured or threatened with material injury, and the establishment of an industry in the United States is not materially retarded, by reason of imports of circular welded carbon-quality steel pipe from India, Oman, the United Arab Emirates, and Vietnam, provided for in subheading(s) 7306.19, 7306.30, and 7306.50 of the Harmonized Tariff Schedule of the United States, that the U.S. Department of Commerce has determined are subsidized and/or sold in the United States at less than fair value (''LTFV'').[2]

Background

The Commission instituted these investigations effective October 26, 2011, following receipt of a petition filed with the Commission and Commerce by Allied Tube and Conduit, Harvey, IL; JMC Steel Group, Chicago, IL; Wheatland Tube, Sharon, PA; and United States Steel Corporation, Pittsburgh, PA. The final phase of the investigations was scheduled by the Commission following notification of preliminary determinations by Commerce that imports of circular welded carbon-quality steel pipe from India, Oman, the United Arab Emirates, and Vietnam were subsidized and/or dumped within the meaning of section 703(b) of the Act (19 U.S.C. 1671b(b)) and 733(b) of the Act (19 U.S.C. 1673b(b)).[3] Notice of the scheduling of the final phase of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on June 22, 2012 (77 FR 37711). The hearing was held in Washington, DC, on October 17, 2012, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on December 5, 2012. The views of the Commission are contained in USITC Publication 4362 (December 2012), entitled *Circular Welded Carbon-Quality Steel Pipe from India, Oman, the United Arab Emirates, and Vietnam: Investigation Nos. 701–TA–482–484 and 731–TA–1191–1194 (Final).*

By order of the Commission.

Issued: December 6, 2012.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2012–29839 Filed 12–10–12; 8:45 am]

BILLING CODE 7020–02–P

[2] Chairman Irving A. Williamson and Commissioner Dean A. Pinkert dissenting.

[3] Following a final negative countervailing duty determination with respect to circular welded carbon-quality steel pipe from Vietnam (77 FR 64471, October 22, 2012), the Commission terminated investigation No. 701–TA–485 (77 FR 65712, October 30, 2012).

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

Notice is hereby given that on December 4, 2012, the Department of Justice lodged a proposed consent decree with the United States District Court for the Central District of California in the lawsuit entitled *City of Colton* v. *American Promotional Events, Inc., et al.,* Civil Action No. CV 09–01864 PSG [Consolidated with Case Nos. CV 09–6630 PSG (SSx), CV 09–06632 PSG (SSx), CV 09–07501 PSG (SSx), CV 09–07508 PSG (SSx), CV 10–824 PSG (SSx) and CV 05–01479 PSG (SSx)].

In this action, the United States filed a complaint, among other things, under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9607, (''CERCLA''), to recover past response costs incurred and other relief in connection with the B.F. Goodrich Superfund Site (''Site'') located approximately 60 miles east of Los Angeles in San Bernardino County, California. The consent decree requires Emhart Industries, Inc. to perform a proposed remedial cleanup action at the Site with a combination of its own funds and funds supplied by other settling parties; requires the Settling Federal Agencies, including the United States Department of Defense to make a payment of $19.5 million–$21.25 million toward the settlement funds, as well as to participate in funding certain cost overruns; and requires additional parties (American Promotional Enterprises, Inc. and American Promotional Enterprises, Inc.—West; Broco, Inc. and J.S. Brower & Associates, Inc.; Whittaker Corporation; Raytheon Company; the Ensign-Bickford Co.; and the County of San Bernardino and related parties) to make a total of $9.95 million in cash contributions to the settlement funds. In return, the United States provides covenants not to sue pursuant to Sections 106 and 107(a) of CERCLA and Section 7003 of the Resource Conservation and Recovery Act. The settlement also provides for the City of Rialto to receive $4,200,000 and the City of Colton to receive $3,800,000 in settlement funds. A hearing will be held on the proposed settlement if requested in writing within the public comment period.

The publication of this notice opens a period for public comment on the consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *City of Colton* v. *American Promotional Events, Inc., et al.,* D.J. Ref. No. 90–11–2–09952. All comments must be submitted by 5:00 p.m. Pacific Standard Time on January 31, 2013. Comments may be submitted either by email or by mail:

To submit comments:	Send them to:
By e-mail	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the consent decree may be examined and downloaded at this Justice Department Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* We will provide a paper copy of the consent decree upon written request and payment of reproduction costs. Please mail your request and payment to:

Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

If requesting a copy of the consent decree with appendices by mail, please enclose a check in the amount of $102.25 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if requesting a copy exclusive of appendices, please enclose a check in the amount of $53.25 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Henry Friedman,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2012–29784 Filed 12–10–12; 8:45 am]

BILLING CODE 4410–CW–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993; Cooperative Research Group on Mechanical Stratigraphy and Natural Deformation in Eagle Ford Formation and Equivalent Boquillas Formation, South-Central and West Texas

Notice is hereby given that, on November 2, 2012, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Southwest Research Institute—Cooperative Research Group on Mechanical Stratigraphy and Natural Deformation in Eagle Ford Formation and Equivalent Boquillas Formation, South-Central and West Texas (''Eagle Ford'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Marathon Oil Company, Upstream Technology, Houston, TX, has been added as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Eagle Ford intends to file additional written notifications disclosing all changes in membership.

On February 23, 2012, Eagle Ford filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on March 15, 2012 (77 FR 15395).

The last notification was filed with the Department on April 25, 2012. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on May 24, 2012 (77 FR 31040).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2012–29826 Filed 12–10–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993; National Warheads and Energetics Consortium

Notice is hereby given that, on November 13, 2012, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), National Warheads and Energetics Consortium (''NWEC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Energetics Technology Center, St. Charles, MD; Kranze Technology Solutions, Inc., Prospect Heights, IL; Meggitt (San Juan Capistrano), Inc., San Juan Capistrano, CA; TenCate Advanced Composites, Morgan Hill, CA; and Waltonen Engineering, Inc., Warren, MI, have been added as parties to this venture. Also, Ceramatec, Inc., Salt Lake City, UT; Manufacturing Techniques, Inc. (MTEQ), Kilmarnock, VA; Phillips Plastics Corporation, Hudson, WI; Synepsys Technologies Inc., Clearwater, FL; and The ENSER Corporation, Pinellas Park, FL, have withdrawn as a parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and NWEC intends to file additional written notifications disclosing all changes in membership.

On May 2, 2000, NWEC filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 30, 2000 (65 FR 40693).

The last notification was filed with the Department on August 7, 2012. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on September 5, 2012 (77 FR 54611).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2012–29823 Filed 12–10–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993; Cooperative Research Group on Development and Validation of Flawpro for Assessing Defect Tolerance of Welded Pipes Under Generalized High Strain Conditions

Notice is hereby given that, on November 2, 2012, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Southwest Research Institute—Cooperative Research Group on Development and Validation of FlawPRO for Assessing Defect Tolerance of Welded Pipes Under Generalized High Strain Conditions (''FlawPRO–JIP'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, ConocoPhillips Company, Houston, TX, has been added as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and FlawPRO–JIP intends to file additional written notifications disclosing all changes in membership.

On May 17, 2011, FlawPRO–JIP filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on July 7, 2011 (76 FR 39901).

The last notification was filed with the Department on August 15, 2011. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on September 21, 2011 (76 FR 58539).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2012–29827 Filed 12–10–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 12–45]

Stephanie A. Tarapchak, M.D.; Decision and Order

On May 1, 2012, Administrative Law Judge (ALJ) Timothy D. Wing issued the attached recommended decision. Neither party filed exceptions to the decision. Having reviewed the entire record, I have decided to adopt the ALJ's rulings, findings of fact, his ultimate conclusion of law, and recommended Order. However, because the ALJ's decision does not adequately explain the legal basis for the Agency's Order, additional clarification is provided below.

As this Agency has repeatedly explained, DEA's longstanding rule that a practitioner may not hold a registration if he lacks authority under state law to dispense controlled substances and that the loss of such authority subjects a practitioner's registration to revocation, is not based solely on 21 U.S.C. 824(a)(3), which is a grant of authority to either suspend or revoke a registration ''upon a finding'' that a registrant ''has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.'' *See, e.g., Richard H. Ng,* 77 FR 29694 (2012); *Segun M. Rasaki,* 77 FR 29692 (2012); *David W. Wang,* 72 FR 54297 (2007). Rather, DEA's rule derives primarily from two other provisions of the Controlled Substances Act (CSA), 21 U.S.C. 802(21), which defines the term ''practitioner,'' and 21 U.S.C. 823(f), which sets forth the requirements for obtaining a registration as a practitioner.

More specifically, the CSA defines ''the term 'practitioner' [to] mean[] a * * * physician * * * or other person licensed, registered or otherwise permitted, by * * * the jurisdiction in which he practices * * * to distribute, dispense, [or] administer * * * a controlled substance in the course of professional practice.'' 21 U.S.C. 802(21). Consistent with this definition, Congress, in setting the requirements for obtaining a practitioner's registration, provided that ''[t]he Attorney General shall register practitioners * * * if the applicant is authorized to dispense * * * controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(f).

Because one cannot obtain a practitioner's registration unless one holds authority under state law to dispense controlled substances, and because where a registered practitioner's state authority has been revoked or suspended, the practitioner no longer meets the statutory definition of a practitioner, DEA has repeatedly held that the possession of authority to dispense controlled substances under the laws of the State in which a practitioner engages in professional practice is a fundamental condition for both obtaining and maintaining a practitioner's registration. *See Hooper* v. *Holder,* 2012 WL 2020079, *2 (4th Cir. 2012) (unpublished) (''Because § 823(f) and § 802(21) make clear that a practitioner's registration is dependent upon the practitioner having state authority to dispense controlled substances, the [DEA]'s decision to construe § 824(a)(3) as mandating revocation upon suspension of a state license is not an unreasonable interpretation of the CSA.''); *see also* ALJ at 4 (citing cases).[1]

Accordingly, the Agency has consistently held that '''the CSA *requires* the revocation of a registration issued to a practitioner * * * even where a state board has suspended (as opposed to revoked) a practitioner's authority with the possibility that the authority may be restored at some point in the future.''' *Hooper,* 2012 WL 2020079, at *2 (quoting *Calvin Ramsey, M.D.,* 76 FR 20034, 20036 (2011)). *See also Kamal Tiwari, M.D.,* 76 FR 71604, 71606 (2011) (''revocation is warranted even where a practitioner's state authority has been summarily suspended and the State has yet to provide the practitioner with a hearing to challenge the State's action at which he may ultimately prevail''); *Bourne Pharmacy, Inc.,* 72 FR 18273, 18274 (2007); *Anne Lazar Thorn,* 62 FR 12847 (1997). I therefore adopt the ALJ's recommended order.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a), as well as 28 CFR 0.100(b), I order that DEA Certificate of Registration BT9132008, issued to Stephanie A. Tarapchak, M.D., be, and it hereby is, revoked. I further order that any pending application of Stephanie A. Tarapchak, M.D., to renew or modify her registration, be, and it hereby is, denied. This Order is effective January 10, 2013.

[1] This citation is to the slip opinion as issued by the ALJ.

Dated: December 3, 2012.

Michele M. Leonhart,

Administrator.

Robert W. Walker, Esq., for the Government

Stephanie A. Tarapchak, M.D., Pro Se

Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of the Administrative Law Judge

Timothy D. Wing, Administrative Law Judge. This proceeding is an adjudication governed by the Administrative Procedure Act, 5 U.S.C. § 551 et seq., to determine whether Respondent's Certificate of Registration (COR) with the Drug Enforcement Administration (DEA) should be revoked, and any pending applications for renewal or modification of that registration and any applications for additional registrations should be denied. Without this registration, Stephanie A. Tarapchak, M.D. (Respondent) would be unable to lawfully possess, prescribe, dispense or otherwise handle controlled substances.

I. Procedural Posture

On February 10, 2012, the Administrator, Drug Enforcement Administration (DEA or Government), issued an Order to Show Cause and Immediate Suspension of Registration (OSC/IS) relating to Certificate of Registration (COR) BT9132008, and served on Respondent on February 14, 2012. The OCS/IS alleged that Respondent's continued registration constitutes an imminent danger to the public health and safety. The OSC/IS also provided notice to Respondent of an opportunity to show cause as to why the DEA should not revoke Respondent's DEA COR BT9132008, pursuant to 21 U.S.C. § 824(a)(4), on the grounds that Respondent's continued registration would be inconsistent with the public interest under 21 U.S.C. § 823(f).

On April 13, 2012, Respondent, acting pro se, filed an untimely request for hearing with the DEA Office of Administrative Law Judges (OALJ) in the above-captioned matter. Acknowledging that her request for hearing was untimely, she requested an extension of time to file her request for hearing pursuant to 21 C.F.R. § 1316.47(b). (Req. for Hr'g at 6.) On April 16, 2012, OALJ sent a letter to Respondent informing her of her right to representation under 21 C.F.R. § 1316.50.

On April 16, 2012, I issued an Order for Prehearing Statements in which I ordered the parties to file statements addressing whether good cause exists

for Respondent's untimely request for hearing. Upon receipt of those statements, on April 24, 2012, I issued a Memorandum and Order Regarding Timeliness of Respondent's Request for Hearing. Although I found good cause for Respondent's untimely request for hearing, I stayed the proceedings and ordered the parties to file, no later than May 1, 2012, a statement addressing whether Respondent has state authority to handle controlled substances.[1]

On May 1, 2012, the Government filed a Motion for Summary Disposition on the grounds that Respondent currently lacks state authority to handle controlled substances. On May 1, 2012, Respondent filed her Statement Addressing Whether Respondent has State Authority to Handle Controlled Substances, in which she concedes that she lacks state authority.

II. The Parties' Contentions

A. The Government

In support of its motion for summary disposition, the Government asserts that on April 11, 2012, the Pennsylvania State Board of Osteopathic Medicine (Board) issued a Notice of disciplinary action and Preliminary Order indefinitely suspending Respondent's state medical license for no less than three (3) years, and that Respondent consequently lacks authority to possess, dispense or otherwise handle controlled substances in Pennsylvania, the jurisdiction in which she maintains her DEA registration. (Mot. at 2.) The Government contends that such state authority is a necessary condition for maintaining a DEA COR and therefore asks that I summarily recommend to the Administrator that Respondent's DEA COR be revoked. (Id. at 2–3.) In support of its motion, the Government cites Agency precedent and attaches the Board's Notice and Preliminary Order referred to above.

B. Respondent

Respondent concedes that ''at this time [she] does not have state authority to handle controlled substances.'' (Resp't May 1, 2012 Stmt. at 1.) Respondent submits that in October 2011, she entered into a Consent Agreement with the Board, which ''subjected her to very restrictive and imposing terms and conditions that were not fully disclosed in the Agreement.'' (Id. at 2.) According to Respondent, on April 11, 2012, the Board filed a Petition for Appropriate Relief, a Preliminary Order, and a Notice of formal disciplinary action, alleging that Respondent violated the terms and conditions of the October 2011 Consent Agreement. (Id. at 3.) The April 11, 2012 Preliminary Order ''suspended [Respondent]'s license to practice osteopathic medicine indefinitely pending the disposition of a hearing.'' (Id.) Respondent also attached the Preliminary Order to her statement.

III. Discussion

At issue is whether Respondent may maintain her DEA COR given that Pennsylvania has suspended her state license to practice medicine.

Under 21 U.S.C. 824(a)(3), a practitioner's loss of state authority to engage in the practice of medicine and to handle controlled substances is grounds to revoke a practitioner's registration. Accordingly, this agency has consistently held that a person may not hold a DEA registration if she is without appropriate authority under the laws of the state in which she does business. See *Scott Sandarg, D.M.D.*, 74 FR 17,528 (DEA 2009); *David W. Wang, M.D.*, 72 FR 54,297 (DEA 2007); *Sheran Arden Yeates, M.D.*, 71 FR 39,130 (DEA 2006); *Dominick A. Ricci, M.D.*,≤ 58 FR 51,104 (DEA 1993); *Bobby Watts M.D.*, 53 FR 11,919 (DEA 1988).

Summary disposition in a DEA revocation case is warranted even if the period of suspension of a respondent's state medical license is temporary, or even if there is the potential for reinstatement of state authority because ''revocation is also appropriate when a state license had been suspended, but with the possibility of future reinstatement.'' *Stuart A. Bergman, M.D.*, 70 FR 33,193 (DEA 2005); *Roger A. Rodriguez, M.D.*, 70 FR 33,206 (DEA 2005).

It is well-settled that when no question of fact is involved, or when the material facts are agreed upon, a plenary, adversarial administrative proceeding is not required, under the rationale that Congress does not intend administrative agencies to perform meaningless tasks. See *Layfe Robert Anthony, M.D.*, 67 FR 35,582 (DEA 2002); *Michael G. Dolin, M.D.*, 65 FR 5661 (DEA 2000); see also *Philip E. Kirk, M.D.*, 48 FR 32,887 (DEA 1983), *aff'd sub nom. Kirk v. Mullen,* 749 F.2d 297 (6th Cir. 1984). *Accord Puerto Rico Aqueduct & Sewer Auth. v. EPA,* 35 F.3d 600, 605 (1st Cir. 1994).

In the instant case, the Government asserts, and Respondent concedes, that Respondent's Pennsylvania medical license is presently suspended. This allegation is confirmed by the attachments to the Government's motion, as well as Respondent's own admission and attachments. I therefore find there is no genuine dispute as to any material fact, and that substantial evidence shows that Respondent is presently without state authority to handle controlled substances in Pennsylvania.

Because ''DEA does not have statutory authority under the Controlled Substances Act to maintain a registration if the registrant is without state authority to handle controlled substances in the state in which he practices,'' *Yeates,* 71 Fed. Reg. at 39,131, I conclude that summary disposition is appropriate. It is therefore

ORDERED that the hearing in this case is hereby CANCELLED; and it is further

ORDERED that all proceedings before the undersigned are STAYED pending the Agency's issuance of a final order.

Recommended Decision

I grant the Government's motion for summary disposition and recommend that Respondent's DEA COR BT9132008 be revoked and any pending applications for renewal or modification of that registration and any applications for additional registrations be denied.

Dated: May 1, 2012.

Timothy D. Wing

Administrative Law Judge

[FR Doc. 2012–29815 Filed 12–10–12; 8:45 am]

BILLING CODE 4410–09–P

[1] In Respondent's Statement of Good Cause Existing in which she addressed good cause for her untimely hearing request, Respondent noted that her former counsel ''received the Order suspending [Respondent]'s license on April 11, 2012 and did not place it in the mail to her until April 16, 2012, with an attendant twenty-day deadline to respond.'' (Resp't April 23, 2012 Stmt. at 11.)

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Robert M. Brodkin, D.P.M.; Decision and Order

On June 6, 2011, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Robert Brodkin, D.P.M. (hereinafter, Respondent), of Lubbock, Texas. The Show Cause Order proposed the denial of Respondent's application for a DEA Certificate of Registration as a practitioner because his ''registration would be inconsistent with the public interest.'' GX 10, at 1 (citing 21 U.S.C. 823(f)).[1]

[1] The Show Cause Order also alleged that Respondent lacks ''authority to handle controlled substances in the State of Arizona.'' GX 10, at 1. This fact is not in dispute, as in his hearing request, Respondent admitted that he ''do[es] not have a license to handle controlled substances in the state of Arizona [and has] never made any claim to the

The Show Cause Order alleged that ''[b]etween April 7, 2007, and February 19, 2008, [Respondent] ordered nearly 5,000 dosage units of controlled substances * * * and diverted those controlled substances for personal use.'' *Id.* The Show Cause Order further alleged that Respondent provided ''false information'' to distributor Henry Schein, Inc., when questioned about his usage of the controlled substances. *Id.*

Next, the Show Cause Order alleged that, on November 20, 2008, Respondent ''entered into a Memorandum of Understanding with the [Texas State Board of Podiatric Medical Examiners]'' after the State Board issued a ''complaint, indicating that [Respondent] had exceeded [his] podiatric practice limitations.'' *Id.* at 2. The Show Cause Order also alleged that Respondent's previous DEA registration was surrendered ''for cause, on April 16, 2008, as a result of allegations that [Respondent was] using [his] registration for ordering and self-administering controlled substances.'' *Id.* at 1.

The Show Cause Order notified Respondent of his right to request a hearing on the allegations or to file a written statement in lieu of a hearing, the procedures for electing either option, and the consequences of failing to do either. *Id.* at 2. On June 13, 2011, the Order was served on Respondent by certified mail. *Id.* at 3.

On June 14, 2011, Respondent submitted a timely hearing request, *see* GX 11, and the matter was placed on the docket of the Office of Administrative Law Judges. On June 27, 2011, the assigned Administrative Law Judge (''ALJ'') issued an Order for Prehearing Statements. *See* GX 12. The Government submitted its Prehearing Statement on July 18, 2011, *see* GX 13, and Respondent submitted his reply on July 28, 2011. *See* GX 14. The ALJ initially scheduled a prehearing conference for August 2, 2011; upon Respondent's unopposed request for a continuance, the conference was rescheduled until September 7, 2011. *See* GX 15.

On September 8, 2011, the ALJ issued a Prehearing Ruling, setting a hearing date of December 13–14, 2011. *See* GX 16. On November 4, 2011, Respondent requested a continuance of the hearing, citing the competing demands of an ''extensive [Medicare] audit procedure.'' GX 17. The Government opposed this request. GX 19. Before ruling on the continuance, the ALJ sought to ''conduct a conference call with both parties.'' GX 20, at 1. In her November 21, 2011 Order Regarding Respondent's Request for a Continuance, the ALJ noted that previous attempts to ''contact Respondent to set up a conference call'' had been ''unsuccessful,'' and she ordered Respondent to submit a ''listing [of] the dates and times of his availability'' by November 28, 2011. *Id.* at 1–2.

When Respondent failed to comply with the ALJ's order, the Government moved to terminate the proceeding. *See* GX 21. Thereupon, on November 29, 2011, the ALJ issued a second Order affording Respondent another opportunity to contact the Court. *See* GX 22. Therein, the ALJ ''warn[ed] Respondent that if he fail[ed] to contact the Court by December 5, 2011, he [would] be deemed to have waived his right to a hearing and [the ALJ] [would] grant the Government's Motion to terminate these proceedings.'' *Id.* at 2.

Once again, Respondent failed to comply with the ALJ's order. Accordingly, on December 6, 2011, the ALJ, having found that ''Respondent [had] constructively waived his right to a hearing under 21 CFR 1301.43(c),'' granted the Government's Motion to Terminate the proceeding. GX 23, at 2.

Under Agency precedent, the failure to comply with an ALJ's orders may constitute a waiver of a hearing request and cause for termination of the proceeding. *See Kamir Garces-Mejias,* 72 FR 54931, 54932 (2007); *Andrew Desonia,* 72 FR 54293, 54294 (2007); *Brenton D. Glisson,* 72 FR 54296 (2007); *Alan R. Schankman,* 63 FR 45260 (1998); *see also Fitzhugh* v. *DEA,* 813 F.2d 1248 (DC Cir. 1987) (upholding revocation order entered after a respondent failed to appear for his hearing). Here, Respondent violated two of the ALJ's orders. Moreover, the ALJ's repeated attempts to contact Respondent proved unsuccessful.

I therefore adopt the ALJ's finding that Respondent has waived his right to a hearing and her order terminating the hearing. I further issue this Decision and Order based on relevant evidence contained in the record submitted by the Government.[2]

Having reviewed the record, I further hold that Respondent has committed acts which render his registration ''inconsistent with the public interest.'' 21 U.S.C. 823(f). I make the following factual findings.

Findings

Respondent is a Doctor of Podiatric Medicine, whose medical practice is limited to podiatry. GX 1, at 3 and GX 2, at 1–4. Under Texas state regulations, Respondent is authorized to ''treat any disease, disorder, physical injury, deformity, or ailment of the human foot.'' Tex. Occ. Code § 202.001(4).

On September 29, 2008, Respondent submitted an application for a DEA Certificate of Registration as a practitioner, seeking authority to dispense controlled substances in Schedules II though V. GX 1, at 3. As the application form states, in order to be eligible for a DEA registration, an applicant ''MUST be currently authorized to prescribe * * * controlled substances * * * under the laws of the state or jurisdiction in which [he or she is] operating or propose[s] to operate.'' *Id.* at 4 (Section 4 of the application). *See also* 21 U.S.C. 823(f). Respondent listed a Texas address but noted that his Texas controlled substance licensure was ''pending.'' *Id.* However, on December 2, 2009, Respondent obtained a state controlled substance registration from the Texas Department of Public Safety. GX 25.

In addition to demonstrating that he possesses state authority to dispense controlled substances, an applicant must answer several other liability questions which seek information regarding any prior administrative or criminal proceedings. GX 1, at 4 (Section 5 of the application). When asked if he had ''ever surrendered (for cause) or had a federal professional license or controlled substance registration revoked, suspended, denied, restricted, or placed on probation,'' Respondent circled ''No'' and handwrote in the margin, ''invol. surrender under duress but not 'for cause.''' *Id.* at 4 (Section 5, Question 2). In response to the application's question regarding disciplinary action taken at the state level, Respondent again circled ''No'' and handwrote in the margin, ''non-judicial; non-due process.'' *Id.* at 4 (Section 5, Question 3). Finally, in the explanatory section below the liability questions, Respondent wrote: ''There have not ever been any incidents.'' *Id.* at 4 (Section 5).

However, Respondent *has* been the subject of both federal and state disciplinary action. Respondent previously held DEA Certificate of Registration AB1847043, *see* GX 24, which he surrendered for cause on April 16, 2008. GX 7. On the ''Voluntary

contrary.'' GX 11, at 1. However, it is not apparent why the allegation is material as Respondent's practice is based in Texas, where he does hold both a medical license and a state controlled substance registration and the Show Cause Order does not allege that he committed any misconduct in Arizona, or in any State outside of Texas. *Id.; see also* GX 25. Nor does the Government offer any explanation as to why Respondent's lack of an Arizona license is a basis for the denial of his application.

[2] On August 3, 2012, the Government forwarded the investigative record to this office with its request for Final Agency Action.

Surrender'' form, Respondent signed his name under language indicating that he ''freely execute[d] this document'' in light of his ''alleged failure to comply with the Federal requirements pertaining to controlled substances, and as an indication of my good faith in desiring to remedy any incorrect or unlawful practices.'' *Id.*

Shortly after Respondent surrendered his DEA registration, state authorities initiated a disciplinary investigation against Respondent. On April 27, 2008, the Texas State Board of Podiatric Medical Examiners issued him a ''Notice of Complaint Allegation.'' GX 2, at 7. Citing Respondent's written communications to the State Board and his letters to drug distributor Henry Schein, Inc., the Complaint alleged that Respondent had ''acknowledged self-treatment of diseases, disorders, physical injuries, deformities, or ailments of conditions beyond the foot/ankle limits of [his] Podiatry license.'' *Id.* at 15. The Complaint further contended that Respondent's ''justifications for purchasing drugs/controlled substances [from] Henry Schein, Inc., were misleading, deceptive, and fraudulent given [Respondent's] own admissions [and] made under false pretenses.'' *Id.*

The federal and state disciplinary investigations stemmed from Respondent's alleged practice of self-prescribing medication outside the scope of his podiatry practice. Between April 2007 and February 2008, Respondent obtained controlled substances from Henry Schein, Inc., and Moore Medical LLC. GX 6. These controlled substances included 225 ampules of Demerol 50 mg/ml (meperidine, a schedule II narcotic); 1200 tablets of diazepam (a schedule IV benzodiazepine); 1500 tablets of hydrocodone/acetaminophen 10/500 mg and 1700 tablets of hydrocodone/acetaminophen 10/325 mg (both schedule III narcotics); 100 vials of midazolam 1 gm (a schedule IV benzodiazepine); 200 tablets of propoxyphene (a schedule IV narcotic); and four bottles of testosterone cypionate 10 ml/bottle (a schedule III anabolic steroid). *Id.*

On May 7, 2007, Respondent sent a letter to Henry Schein, Inc., responding to the company's questioning of his controlled substance orders. GX 3. In the letter, Respondent claimed that he did ''12 to 15 surgical cases per week,'' including ''major-type foot surgeries,'' necessitating that he have a steady supply of pain control medications:

> In general, in my clinic I do three major-type foot surgeries per week, usually one each on Monday, Wednesday and Friday. On some weeks we will add one or two additional case[s] on either Tuesday or Thursday. So, the baseline total of cases comes out to 12 to 15 surgical cases per week.

Id. at 1–2. Respondent then explained how he was administering drugs such as Demerol, Valium, and midazolam to his surgical patients, as well as dispensing additional drugs including hydrocodone tablets to the purported patients for post-operative pain control. *Id.* at 2–3. Following the letter, Schein continued to distribute controlled substances to Respondent. GX 6, at 1–2.

However, in an April 4, 2008 letter to the Executive Director/Investigator of the Texas State Board of Podiatric Medical Examiners, Respondent wrote that he had ''voluntarily quit doing foot surgery in June of 2002'' due to his severe back pain. GX 8, at 1. Respondent further admitted that he ''voluntarily quit seeing patients directly as of June, 2003'' and that his practice ''consisted of my supervising highly trained podiatry assistants in providing mycotic nail care for elderly patients.'' *Id.*

Respondent's letter to the State Board's Investigator was thus fundamentally inconsistent with his earlier statements to Schein that he was ''do[ing] three major-type foot surgeries per week,'' plus additional cases for a total of ''12 to 15 surgical cases per week.'' GX 3, at 1. Moreover, in his letter to the Board, Respondent intimated that he had been using the controlled substances he ordered from Henry Schein and Moore Medical to treat his own back pain.[3] For example, Respondent explained that he had stopped seeing patients due to a ''hellish pain'' in his lower back. GX 8, at 1. Respondent then offered a description of his use of controlled substances:

> I was able to quit taking Lortab pills, a Class III substance for pain control in January, 2008 for the simple reason that I no longer needed them. The last time I ordered any [C]lass II products was also in January, 2008; I simply did not need this powerful a substance to control what had been nearly unendurable pain. I still had a generalized achiness about my entire back[,] and I am now using a low dose Class IV product.

Id. at 2.

On April 16, 2008, Respondent voluntarily surrendered his DEA registration. GX 7. Two days later, Respondent wrote a letter to a DEA Diversion Investigator, in which he denied being ''a drug addict'' or ''hav[ing] any addiction issues.'' GX 5, at 1. Respondent also explained that ''any pain medications [he] previously utilized were indeed used under medical supervision, in an entirely proper and correct fashion to control what would otherwise be severe pain of the most intense nature.'' *Id.* at 2. Moreover, in his Request for Hearing, Respondent replied to the allegations of the Show Cause Order, asserting that:

> [t]he fact is that the State Board *did* use the terminology 'cease and desist' but only in regard to my having been practicing general medicine, i.e., self-treating my severe, life-threating back pain prior to the sixth and last definitive back surgery having been performed on October 2nd, 2007. That is to say, my State Board recognized that my self-prescription of pain medication was in fact, *medical practice* * * *.''

GX 11, at 3 (emphasis in original).[4]

On November 20, 2008, Respondent entered into a Memorandum of Understanding with the Texas State Board. *See* GX 2. Respondent signed the Memorandum in lieu of disciplinary action, acknowledging that ''[p]odiatrists can write prescriptions to treat any disease, disorder, physical injury deformity or ailment of the human foot, *but only for a valid medical purpose supported by proper medical record documentation and limited to the Foot/Ankle scope of practice.''* GX 2, at 3 (emphasis added).

Discussion

Under the Controlled Substances Act, the ''Attorney General may deny an application for [] registration * * * if the Attorney General determines that the issuance of such registration * * * would be inconsistent with the public interest.'' 21 U.S.C. 823(f). In making the public interest determination,'' Congress directed that the following factors be considered:

> (1) The recommendation of the appropriate State licensing board or professional disciplinary authority.
>
> (2) The applicant's experience in dispensing * * * controlled substances.
>
> (3) The applicant's conviction record under Federal or State laws relating to the

[3] Respondent later confirmed these allegations in his Request for Hearing and Pre-Hearing Statement. *See* GX 11, at 3; GX 14, at 3.

[4] In his Pre-Hearing Statement, Respondent likewise wrote:

> During the period starting approximately in 2004, I developed an extremely severe level of low back pain. I consulted with numerous specialist physicians * * * in unsuccessful attempts to determine the precise cause of the pain. Many of the consulted doctors, looking strictly at MRI scans which were presumably done on inferior quality MR scanning devices, claimed that no pathology existed. Why would any doctor prescribe pain medications for a condition that they incorrectly believed did not actually exist? As the condition continued to worsen, I utilized pain medication, in a regimen of medical treatment supervised by myself, in order to alleviate at least a small portion of the pain present.
>
> GX 14, at 3.

manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

Id.

The public interest factors are considered in the disjunctive. *Robert A. Leslie,* 68 FR 15227, 15230 (2003). I may rely on any one or a combination of factors and may give each factor the weight I deem appropriate in determining whether to deny an application for a registration. *Id.* Moreover, I am ''not required to make findings as to all of the factors.'' *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *see also MacKay v. DEA,* 664 F.3d 808, 816 (10th Cir. 2011); *Morall* v. *DEA,* 412 F.3d 165, 173–74 (D.C. Cir. 2005).

The Government has ''the burden of proving that the requirements for [] registration * * * are not satisfied.'' 21 CFR 1301.44(d). As no DEA regulation provides that the consequence of waiving a hearing is a default, the Government must therefore support its proposed action with substantial evidence.

Having considered all of the factors, I conclude that the Government's evidence pertinent to Factors Two (Respondent's experience in dispensing controlled substances) and Four (Respondent's compliance with applicable laws related to controlled substances), establishes that Respondent has committed acts which render his registration ''inconsistent with the public interest.'' 21 U.S.C. 823(f).[5] Because there is no evidence that Respondent acknowledges his misconduct, I conclude that his application should be denied.

[5] Factor one does not support a finding either for, or against, the continuation of Respondent's registration. The Podiatry Board has not made a recommendation to DEA, and in any event, while Respondent currently possesses authority under Texas law to dispense controlled substances, thus satisfying a prerequisite for obtaining a registration, the Agency has repeatedly held that a practitioner's possession of state authority is not dispositive of question of whether his registration would be consistent with the public interest. *See* 21 U.S.C. 823(f); *see also Patrick W. Stodola,* 74 FR 20727, 20730 n.16 (2009) (citing *Mortimer B. Levin,* 55 FR 8209, 8210 (1990)).

As for factor three, there is no evidence in the record that Respondent has been convicted of an offense related to the manufacture, distribution, or dispensing of controlled substances. *See id.* § 823(f)(3). However, DEA has long held that this factor is not dispositive. *See, e.g., Edmund Chein,* 72 FR 6580, 6593 n.22 (2007).

Factors Two and Four—Respondent's Experience in Dispensing Controlled Substances and Compliance With Applicable Laws Related to Controlled Substances

The CSA makes it ''unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter.'' 21 U.S.C. 844(a). Moreover, it is ''unlawful for any person knowingly or intentionally * * * to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge.'' *Id.* § 843(c)(3).

Under the CSA, a practitioner is bound by the scope of his professional practice. As the Supreme Court has explained, ''the scheme of the [CSA], viewed against the background of the legislative history, reveals an intent to limit a registered physician's dispensing authority *to the course of his 'professional practice.'' United States* v. *Moore,* 423 U.S. 122, 140 (1975). (emphasis added). *See also* 21 U.S.C. 802(21) (Defining ''[t]he term 'practitioner' [to] mean[] a physician * * * licensed, registered, or otherwise permitted, by the * * * jurisdiction in which he practices * * * to distribute, dispense, [or] administer * * * a controlled substances in the course of professional practice.''); *United States* v. *Tran Trong Cuong,* 18 F.3d 1132, 1137 (4th Cir. 1994) (''[A] licensed physician who prescribes controlled substances outside the bounds of his professional medical practice is subject to prosecution.''); 21 CFR 1306.04(a) (''A prescription for a controlled substance * * * must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice * * * An order purporting to be a prescription issued not in the usual course of professional treatment * * * is not a prescription within the meaning and intent of'' the CSA.).

As found above, Respondent is a podiatrist, and under Texas law, his practice is limited to ''treat[ing] any disease, disorder, physical injury, deformity, or ailment of the human foot.'' Tex. Occ. Code § 202.001(4). *See also* GX 2, at 2 (Memorandum of Understanding between Respondent and Texas State Board of Podiatric Medical Examiners) (Respondent ''takes notice that the practice of Podiatry in Texas is limited to treatment of the Foot/Ankle.''). Moreover, as the Memorandum of Understanding makes clear, ''Podiatrists can write prescriptions to treat any disease, disorder, physical injury, deformity or ailment of the human foot, but only for a valid medical purpose supported by proper medical record documentation and limited to the Foot/Ankle scope of practice.'' *Id.* at 3.

The record contains substantial evidence that Respondent dispensed to himself controlled substances and acted outside of the usual course of his professional practice. In various statements to both state and agency officials, Respondent provided evidence that he was administering controlled substances to himself to treat a back injury. While in some of these statements, Respondent merely alluded to back injuries which caused him to suspend his podiatry practice while continuing to order pain medications, in several statements Respondent expressly admitted that he was self-administering controlled substances. *See* GX 11, at 3 (Resp. Req. for Hearing; Statement; ''my State Board recognized that my self-prescription of pain medication was in fact, *medical practice''*); GX 14, at 3 (Resp. Pre-Hearing Statement; ''During the period starting approximately 2004, I developed an extremely severe level of low back pain * * * . As the condition continued to worsen, I utilized pain medication in a regimen of medical treatment supervised by myself.'').

By engaging in the self-administration of controlled substances to treat his back injury, Respondent exceeded the bounds of his professional practice as a Podiatrist. Indeed, he acknowledged as much in the Memorandum of Understanding. GX 2, at 3 & 5. And because he did not obtain the controlled substances he self-administered ''pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice,'' Respondent unlawfully possessed those controlled substances. 21 U.S.C. 844(a).

The evidence also supports a finding that Respondent obtained controlled substances from Henry Schein, Inc., by misrepresentation, fraud, or deception. *Id.* § 843(a)(3). When questioned by the company as to his ordering of controlled substances, Respondent represented that he was performing three major foot surgeries a week, as well as additional procedures for a total of ''12 to 15 surgical cases per week.'' Respondent then explained how he was administering drugs such as Demerol, Valium, and midazolam to his purported surgical patients, as well as

dispensing additional drugs including hydrocodone tablets to the purported patients for post-operative pain control. However, as Respondent admitted in his letter to the State Board's Executive Director, because of his back pain, he had ''voluntarily quit doing foot surgery in June of 2002'' and had ''voluntarily quit seeing patients directly as of June, 2003.'' Thus, I conclude that Respondent's statements to Henry Schein, Inc., were intentional misrepresentations of the nature of his medical practice which he made to induce Schein to continue to distribute controlled substances to him, which it did.

Accordingly, I find that the Government has established that granting Respondent's application ''would be inconsistent with the public interest.'' 21 U.S.C. 823(f). I will therefore order that Respondent's application for a new registration be denied.[6]

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f), as well as 28 CFR 0.100(b), I order that the application of Robert M. Brodkin, D.P.M., for a DEA Certificate of Registration as a practitioner, be, and it hereby is, denied. This Order is effective January 10, 2013.

Dated: December 3, 2012.

Michele M. Leonhart,

Administrator.

[FR Doc. 2012–29816 Filed 12–10–12; 8:45 am]

BILLING CODE 4410–09–P

[6] While I have reviewed Respondent's Pre-Hearing Statement and treated it as if it was a statement submitted in lieu of a hearing, *see* 21 CFR 1301.43(c), the only mitigating evidence contained therein is the statement that the State Board's ''inquiry was closed with a 'Memorandum of Understanding' that the practice of podiatric medicine and surgery in Texas does not include the medical treatment of back problems. I agreed with this and agreed to abstain from any further general medical practice of any sort, particularly the medical treatment of severe back pain.'' GX 14, at 4. Nothing in Respondent's statement manifests that he acknowledges the illegality of his acts of self-dispensing and obtaining controlled substances by misrepresentation. *See, e.g., Jeri Hassman,* 75 FR 8194, 8236 (2010) (''To rebut the Government's *prima facie* case, [the Respondent] is required not only to accept responsibility for [the established] misconduct, but also to demonstrate what corrective measures [have been] undertaken to prevent the reoccurrence of similar acts.''). *See also Ronald Lynch,* 75 FR 78745, 78753–54 (2010) (registrant's attempts to minimize misconduct held to undermine acceptance of responsibility); *George Mathew,* 75 FR 66138, 66140, 66145, 66148 (2010) (registrant's failure to address misconduct warranted revocation of his registration); *Steven M. Abbadessa,* 74 FR 10077, 10078 (2009) (registrant's acceptance of responsibility and demonstration of corrective measures supported granting application); *Jayam Krishna-Iyer,* 74 FR 459, 463 (2009) (registrant granted new registration following suspension where she finally acknowledged her wrongdoing).

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Carrier's Report of Issuance of Policy

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Office of Workers' Compensation Programs (OWCP) sponsored information collection request (ICR) revision titled, ''Carrier's Report of Issuance of Policy,'' to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 et seq.).

DATES: Submit comments on or before January 10, 2013.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain,* on the day following publication of this notice or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–OWCP, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503, Fax: 202–395–6881 (this is not a toll-free number), email: *OIRA_submission@omb.eop.gov.*

FOR FURTHER INFORMATION: Contact Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: The Longshore and Harbor Workers' Compensation Act requires each covered employer to secure its liabilities under the Act, either by purchasing a policy of insurance from an authorized carrier or by qualifying as a self-insurer. *See* 33 U.S.C. 932(a). Regulations 20 CFR 703.116 requires an authorized carrier to report to the OWCP each policy the carrier has issued to an employer. Authorized carriers may use the Carrier's Report of Issuance of Policy, Form LS–570, to submit the information. This ICR is being revised to reflect an electronic filing option.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1240–0004. The current approval is scheduled to expire on 1240–0004; however, it should be noted that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional information, see the related notice published in the **Federal Register** on August 29, 2012 (77 FR 52370).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1240–0004. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: DOL–OWCP.

Title of Collection: Carrier's Report of Issuance of Policy.

OMB Control Number: 1240–0004.

Affected Public: Private Sector—businesses or other for-profits.

Total Estimated Number of Respondents: 360.

Total Estimated Number of Responses: 5,000.

Total Estimated Annual Burden Hours: 83.

Total Estimated Annual Other Costs Burden: $2,650.

Dated: December 4, 2012.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2012–29785 Filed 12–10–12; 8:45 a.m.]

BILLING CODE 4510–CF–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Request for Employment Information

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Office of Workers' Compensation Programs (OWCP) sponsored information collection request (ICR) revision titled, ''Request for Employment Information,'' to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 et seq.).

DATES: Submit comments on or before January 10, 2013.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain,* on the day following publication of this notice or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an email to *DOL_PRA_PUBLIC@dol.gov*.

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–OWCP, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503, Fax: 202–395–6881 (this is not a toll-free number), email: *OIRA_submission@omb.eop.gov*.

FOR FURTHER INFORMATION CONTACT: Contact Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov*.

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: The OWCP uses this information collection to obtain data about a workers' compensation claimant's private sector employment. The OWCP uses the information to determine continued eligibility for benefits under the Federal Employees' Compensation Act. This ICR has been classified as a revision because of added language to Form CA–1027, the form used to collect employment information, on the rights of respondents with disabilities.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1240–0047. The current approval is scheduled to expire on December 31, 2012; however, it should be noted that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional information, see the related notice published in the **Federal Register** on August 30, 2012 (77 FR 52764).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1205–0047. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: DOL–OWCP.

Title of Collection: Request for Employment Information.

OMB Control Number: 1240–0047.

Affected Public: Private Sector—businesses or other for-profits.

Total Estimated Number of Respondents: 431.

Total Estimated Number of Responses: 431.

Total Estimated Annual Burden Hours: 108.

Total Estimated Annual Other Costs Burden: $207.

Dated: December 5, 2012.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2012–29814 Filed 12–10–12; 8:45 am]

BILLING CODE 4510–CH–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Escape and Evacuation Plans for Surface Coal Mines and Surface Facilities and Surface Work Areas of Underground Coal Mines

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Mine safety and Health Administration (MSHA) sponsored information collection request (ICR) titled, ''Escape and Evacuation Plans for Surface Coal Mines and Surface Facilities and Surface Work Areas of Underground Coal Mines,'' to the Office of Management and Budget (OMB) for review and approval for continued use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 *et seq.*).

DATES: Submit comments on or before January 10, 2013.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain,* on the day following publication of this notice or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk

Officer for DOL–MSHA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503, Fax: 202–395–6881 (this is not a toll-free number), email: *OIRA_submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: Regulations 30 CFR 77.1101 requires operators of surface coal mines and surface facilities and surface work areas of underground coal mines to establish and to keep current a specific escape and evacuation plan to be followed in the event of a fire. The plan is used to instruct employees in the proper method of exiting work areas in the event of a fire. The MSHA, mine operators, and others also use the escape and evacuation plan in rescue and recovery efforts.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1219–0051. The current approval is scheduled to expire on January 31, 2013; however, it should be noted that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional information, see the related notice published in the **Federal Register** on August 20, 2012 (77 FR 60165).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the ADDRESSES section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1219–0051. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: DOL–MSHA.

Title of Collection: Escape and Evacuation Plans for Surface Coal Mines and Surface Facilities and Surface Work Areas of Underground Coal Mines.

OMB Control Number: 1219–0051.

Affected Public: Private Sector—businesses or other for-profits.

Total Estimated Number of Respondents: 295.

Total Estimated Number of Responses: 295.

Total Estimated Annual Burden Hours: 1,425.

Total Estimated Annual Other Costs Burden: $0.

Dated: December 5, 2012.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2012–29869 Filed 12–10–12; 8:45 am]

BILLING CODE 4510–43–P

NUCLEAR REGULATORY COMMISSION

Notice of Extension of Call for Nominations for the Advisory Committee on the Medical Uses of Isotopes

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Notice.

SUMMARY: A call for nominations was published by the U.S. Nuclear Regulatory Commission (NRC) in the **Federal Register** (77 FR 62538–62539) on October 15, 2012 for the positions of health care administrator and nuclear cardiologist on the Advisory Committee on the Medical Uses of Isotopes (ACMUI). The nomination period ends on December 14, 2012. This notice confirms a 60 day extension of the nomination period until February 14, 2013.

DATES: Nominations are due on or before February 14, 2013.

Nomination Process: Submit an electronic copy of a resume or curriculum vitae, along with a cover letter, to Ms. Sophie Holiday, *sophie.holiday@nrc.gov.*

The resume or curriculum vitae for the health care administrator should include the following information, as applicable: education; certification; professional association membership and committee membership activities; and number of years, recentness, and type of setting for health care administration. The cover letter should describe the nominee's current involvement with health care administration and express the nominee's interest in the position.

The resume or curriculum vitae for the nuclear cardiologist should include the following information, as applicable: education; certification; professional association membership and committee membership activities; and number of years, recentness, and type of setting for nuclear cardiology. The cover letter should describe the nominee's current involvement with nuclear cardiology and express the nominee's interest in the position.

FOR FURTHER INFORMATION CONTACT: Ms. Sophie Holiday, U.S. Nuclear Regulatory Commission, Office of Federal and State Materials and Environmental Management Programs; (301) 415–7865; *sophie.holiday@nrc.gov.*

Dated at Rockville, Maryland this 5th day of December 2012.

For the U.S. Nuclear Regulatory Commission.

Andrew L. Bates,

Advisory Committee Management Officer.

[FR Doc. 2012–29892 Filed 12–10–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0292]

Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations

Background

Pursuant to Section 189a. (2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (the Commission or NRC) is publishing this regular biweekly notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make

immediately effective any amendment to an operating license or combined license, as applicable, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from November 15 to November 28, 2012. The last biweekly notice was published on November 27, 2012 (77 FR 70837).

ADDRESSES: You may access information and comment submissions related to this document, which the NRC possesses and are publicly available, by searching on *http://www.regulations.gov* under Docket ID NRC–2012–0292. You may submit comments by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0292. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.
- *Fax comments to:* RADB at 301–492–3446.

For additional direction on accessing information and submitting comments, see ''Accessing Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

SUPPLEMENTARY INFORMATION:

I. Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC–2012–0292 when contacting the NRC about the availability of information regarding this document. You may access information related to this document by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0292.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents''* and then select ''*Begin Web-based ADAMS Search.''* For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* Documents may be viewed in ADAMS by performing a search on the document date and docket number.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2012–0292 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information that that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *http://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses and Combined Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in section 50.92 of Title 10 of the *Code of Federal Regulations* (10 CFR), this means that operation of the facility in accordance with the proposed amendment would not (1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendment to the subject facility operating license or combined license. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the NRC's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. The NRC's regulations are accessible electronically from the NRC Library on the NRC's Web site at *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a

notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the requestor/petitioner seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the requestor/petitioner shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the requestor/petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the requestor/petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the requestor/petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of any amendment.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139; August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to request (1) a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in the NRC's ''Guidance for Electronic Submission,'' which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through the Electronic Information Exchange System, users will be required to install a Web browser plug-in from the NRC's Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with the NRC's guidance available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the ''Contact Us'' link located on the NRC's Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by email at *MSHD.Resource@nrc.gov,* or by a toll-

free call at 1–866 672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) first class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *http://ehd1.nrc.gov/ehd/,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 60 days from the date of publication of this notice. Requests for hearing, petitions for leave to intervene, and motions for leave to file new or amended contentions that are filed after the 60-day deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the following three factors in 10 CFR 2.309(c)(1): (i) The information upon which the filing is based was not previously available; (ii) the information upon which the filing is based is materially different from information previously available; and (iii) the filing has been submitted in a timely fashion based on the availability of the subsequent information.

For further details with respect to this license amendment application, see the application for amendment which is available for public inspection at the NRC's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available documents created or received at the NRC are accessible electronically through ADAMS in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC's PDR Reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.*

Dominion Nuclear Connecticut, Inc., Docket No. 50–423, Millstone Power Station, Unit 3, New London County, Connecticut

Date of amendment request: October 4, 2012.

Description of amendment request: The proposed amendment would modify Technical Specifications by relocating specific surveillance frequencies to a licensee controlled program with the adoption of Technical Specification Task Force (TSTF)-425, Revision 3, ''Relocate Surveillance Frequencies to Licensee Control—Risk-Informed Technical Specification Task Force (RITSTF) Initiative 5b.'' Additionally, the change would add a new program, the Surveillance Frequency Control Program (SFCP), to TS Section 6, Administrative Controls.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Do the proposed changes involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed changes relocate the specified frequencies for periodic surveillance requirements to licensee control under a new Surveillance Frequency Control Program. Surveillance frequencies are not an initiator to any accident previously evaluated. As a result, the probability of any accident previously evaluated is not significantly increased. The systems and components required by the TSs for which the surveillance frequencies are relocated are still required to be operable, meet the acceptance criteria for the surveillance requirements, and be capable of performing any mitigation function assumed in the accident analysis. As a result, the consequences of any accident previously evaluated are not significantly increased.

Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Do the proposed changes create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

No new or different accidents result from utilizing the proposed changes. The changes do not involve a physical alteration of the plant (i.e., no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. In addition, the changes do not impose any new or different requirements. The changes do not alter assumptions made in the safety analysis. The proposed changes are consistent with the safety analysis assumptions and current plant operating practice.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in the margin of safety?

Response: No.

The design, operation, testing methods, and acceptance criteria for systems, structures, and components (SSCs), specified in applicable codes and standards (or alternatives approved for use by the NRC) will continue to be met as described in the plant licensing basis (including the final safety analysis report and bases to TS), since these are not affected by changes to the surveillance frequencies. Similarly, there is no impact to safety analysis acceptance criteria as described in the plant licensing basis. To evaluate a change in the relocated surveillance frequency, Dominion will perform a probabilistic risk evaluation using the guidance contained in NRC approved NEI 04–10, Rev. 1, in accordance with the TS SFCP. NEI 04–10, Rev. 1, methodology provides reasonable acceptance guidelines and methods for evaluating the risk increase of proposed changes to surveillance frequencies consistent with Regulatory Guide 1.177.

Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff

proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Lillian M. Cuoco, Senior Counsel, Dominion Resources Services, Inc., 120 Tredegar Street, RS–2, Richmond, VA 23219.

NRC Branch Chief: George A. Wilson.

Duke Energy Carolinas, LLC, Docket Nos. 50–270 and 50–287, Oconee Nuclear Station, Units 2 and 3 (ONS2 and ONS3), Oconee County, South Carolina

Date of amendment request: October 5, 2012.

Description of amendment request: The proposed amendment would revise the Technical Specifications (TSs) to authorize a one-time, 19 month extension to the integrated leak rate test (ILRT) of the reactor containment building (also known as the containment). The ILRT is normally performed every 10 years. The upcoming ILRT for ONS2 is currently due by May 29, 2014, and for ONS3 is due by December 21, 2014.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed exemption involves a one-time extension to the current interval for ONS Unit 2 and Unit 3 Type A containment testing. The current test interval of 120 months (10 years) would be extended on a one-time basis to no longer than approximately 139 months from the last Type A test. The proposed extension does not involve either a physical change to the plant or a change in the manner in which the plant is operated or controlled. The containment is designed to provide an essentially leak tight barrier against the uncontrolled release of radioactivity to the environment for postulated accidents. As such, the containment and the testing requirements invoked to periodically demonstrate the integrity of the containment exist to ensure the plant's ability to mitigate the consequences of an accident, and do not involve the prevention or identification of any precursors of an accident. Therefore, this proposed extension does not involve a significant increase in the probability of an accident previously evaluated.

This proposed extension is for the next ONS Unit 2 and Unit 3 Type A containment leak rate test only. The Type B and C containment leak rate tests would continue to be performed at the frequency currently required by the ONS TS [Technical Specification]. As documented in NUREG–1493, Type B and C tests have identified a very large percentage of containment leakage paths and the percentage of containment leakage paths that are detected only by Type A testing is very small. The ONS Unit 2 and Unit 3 Type A test history supports this conclusion.

The integrity of the containment is subject to two types of failure mechanisms that can be categorized as (1) activity based and (2) time based. Activity based failure mechanisms are defined as degradation due to system and/or component modifications or maintenance. Local leak rate test requirements and administrative controls such as configuration management and procedural requirements for system restoration ensure that containment integrity is not degraded by plant modifications or maintenance activities. The design and construction requirements of the containment combined with the containment inspections performed in accordance with ASME [American Society of Mechanical Engineers] Section Xl, the Maintenance Rule, and TS requirements serve to provide a high degree of assurance that the containment would not degrade in a manner that is detectable only by a Type A test.

Based on the above, the proposed extension does not significantly increase the consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed amendment to the TS involves a one-time extension to the current interval for the ONS Unit 2 and Unit 3 Type A containment test. The containment and the testing requirements to periodically demonstrate the integrity of the containment exist to ensure the plant's ability to mitigate the consequences of an accident do not involve any accident precursors or initiators. The proposed change does not involve a physical change to the plant (i.e., no new or different type of equipment will be installed) or a change to the manner in which the plant is operated or controlled.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed amendment to the TS involves a one-time extension to the current interval for the ONS Unit 2 and Unit 3 Type A containment test. This amendment does not alter the manner in which safety limits, limiting safety system set points, or limiting conditions for operation are determined. The specific requirements and conditions of the TS Containment Leak Rate Testing Program exist to ensure that the degree of containment structural integrity and leak-tightness that is considered in the plant safety analysis is maintained. The overall containment leak rate limit specified by TS is maintained.

The proposed change involves only the extension of the interval between Type A containment leak rate tests for ONS Unit 2 and Unit 3. The proposed surveillance interval extension is bounded by the 15 year ILRT Interval currently authorized within NEI [Nuclear Energy Institute] 94–01, Revision 2A. Type B and C containment leak rate tests would continue to be performed at the frequency currently required by TS. Industry experience supports the conclusion that Type B and C testing detects a large percentage of containment leakage paths and that the percentage of containment leakage paths that are detected only by Type A testing is small. The containment inspections performed in accordance with ASME Section Xl, TS and the Maintenance Rule serve to provide a high degree of assurance that the containment would not degrade in a manner that is detectable only by Type A testing. The combination of these factors ensures that the margin of safety in the plant safety analysis is maintained. The design, operation, testing methods and acceptance criteria for Type A, B, and C containment leakage tests specified in applicable codes and standards would continue to be met, with the acceptance of this proposed change, since these are not affected by changes to the Type A test interval.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Lara S. Nichols, Associate General Counsel, Duke Energy Corporation, 526 South Church Street—EC07H, Charlotte, NC 28202–1802.

NRC Branch Chief: Robert J. Pascarelli.

Northern States Power Company—Minnesota, Docket No. 50–263, Monticello Nuclear Generating Plant, Wright County, Minnesota

Date of amendment request: September 18, 2012.

Description of amendment request: The amendment proposes to revise Technical Specification (TS) Sections 3.1.6, ''Rod Pattern Control,'' and 3.3.2.1, ''Control Rod Block Instrumentation,'' to allow MNGP to reference an optional improved Banked Position Withdrawal Sequence (BPWS) shutdown sequence in the TS Bases. In addition, a footnote is revised in TS Table 3.3.2.1–1, ''Control Rod Block Instrumentation,'' to allow operators to bypass the rod worth minimizer if conditions for the optional BPWS shutdown process are satisfied. The changes are consistent with NRC-approved Technical Specification Task Force (TSTF) Improved Standard Technical Specifications Change Traveler, TSTF–476, Revision 1, ''Improved BPWS Control Rod Insertion Process (NEDO–33091).''

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee provided its analysis of the issue of no significant hazards consideration. Consistent with the consolidated line item improvement process (CLIIP), the licensee referenced the no

significant hazards consideration published in the **Federal Register** on May 23, 2007 (72 FR 29004), which is provided below:

Criterion 1—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The proposed changes modify the TS to allow the use of the improved banked position withdrawal sequence (BPWS) during shutdowns if the conditions of NEDO–33091–A, Revision 2, ''Improved BPWS Control Rod Insertion Process,'' July 2004, have been satisfied. The staff finds that the licensee's justifications to support the specific TS changes are consistent with the approved topical report and TSTF–476, Revision 1. Since the change only involves changes in control rod sequencing, the probability of an accident previously evaluated is not significantly increased, if at all. The consequences of an accident after adopting TSTF–476 are no different than the consequences of an accident prior to adopting TSTF–476. Therefore, the consequences of an accident previously evaluated are not significantly affected by this change. Therefore, this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Criterion 2—The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident From any Previously Evaluated

The proposed change will not introduce new failure modes or effects and will not, in the absence of other unrelated failures, lead to an accident whose consequences exceed the consequences of accidents previously evaluated. The control rod drop accident (CRDA) is the design basis accident for the subject TS changes. This change does not create the possibility of a new or different kind of accident from an accident previously evaluated.

Criterion 3—The Proposed Change Does Not Involve a Significant Reduction in the Margin of Safety

The proposed change, TSTF–476, Revision 1, incorporates the improved BPWS, previously approved in NEDO–33091–A, into the improved TS. The control rod drop accident (CRDA) is the design basis accident for the subject TS changes. In order to minimize the impact of a CRDA, the BPWS process was developed to minimize control rod reactivity worth for BWR plants. The proposed improved BPWS further simplifies the control rod insertion process, and in order to evaluate it, the staff followed the guidelines of Standard Review Plan Section 15.4.9, and referred to General Design Criterion 28 of Appendix A to 10 CFR Part 50 as its regulatory requirement. The TSTF stated the improved BPWS provides the following benefits: (1) Allows the plant to reach the all-rods-in condition prior to significant reactor cool down, which reduces the potential for re-criticality as the reactor cools down; (2) reduces the potential for an operator reactivity control error by reducing the total number of control rod manipulations; (3) minimizes the need for manual scrams during plant shutdowns, resulting in less wear on control rod drive (CRD) system components and CRD mechanisms; and, (4) eliminates unnecessary control rod manipulations at low power, resulting in less wear on reactor manual control and CRD system components. The addition of procedural requirements and verifications specified in NEDO–33091–A, along with the proper use of the BPWS will prevent a control rod drop accident (CRDA) from occurring while power is below the low power setpoint (LPSP). The net change to the margin of safety is insignificant. Therefore, this change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Peter M. Glass, Assistant General Counsel, Xcel Energy Services, Inc., 414 Nicollet Mall, Minneapolis, MN 55401.

NRC Branch Chief: Robert D. Carlson.

Northern States Power Company—Minnesota, Docket No. 50–263, Monticello Nuclear Generating Plant, Wright County, Minnesota

Date of amendment request: September 18, 2012.

Description of amendment request: The amendment proposes to revise Technical Specification (TS) 3.8.3, ''Diesel Fuel Oil, Lube Oil, and Starting Air,'' by relocating the current stored diesel fuel oil and lube oil numerical volume requirements from the TS to the TS Bases so that they may be modified under licensee control. The TS are modified so that the stored diesel fuel oil and lube oil inventory will require that a 7-day supply be available for operation of one emergency diesel generator, and the stored lube oil inventory will also continue to require that a 7-day supply be available for each diesel generator. The changes are consistent with NRC-approved Technical Specification Task Force (TSTF) Improved Standard Technical Specifications Change Traveler (TSTF–501), Revision 1, ''Relocate Stored Fuel Oil and Lube Oil Volume Values to Licensee Control.''

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change relocates the volume of diesel fuel oil required to support 7-day operation of a[n] emergency diesel generator (EDG), and the volume equivalent to a 6-day supply, to licensee control. The proposed change also relocates the volume of diesel lube oil required to support 7-day operation of each onsite EDG, and the volume [of fuel oil] equivalent to a 6-day supply, to licensee control. The specific volume of fuel oil equivalent to a 7-day and 6-day supply is calculated using the NRC-approved methodology described in Regulatory Guide 1.137, ''Fuel-Oil Systems for Standby Diesel Generators,'' and ANSI N195–1976, ''Fuel Oil Systems for Standby Diesel-Generators.'' The specific volume of lube oil equivalent to a 7-day and 6-day supply is based on the diesel generator manufacturer's consumption values for the run time of the diesel generator. Because the requirement to maintain a 7-day supply of diesel fuel oil and lube oil is not changed and is consistent with the assumptions in the accident analyses, and the actions taken when the volume of fuel oil and lube oil are less than a 6-day supply have not changed, neither the probability nor the consequences of any accident previously evaluated will be affected.

Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The change does not involve a physical alteration of the plant (i.e., no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. The change does not alter assumptions made in the safety analysis but ensures that the diesel generator operates as assumed in the accident analysis. The proposed change is consistent with the safety analysis assumptions.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed change relocates the volume of diesel fuel oil required to support 7-day operation of a[n] emergency diesel generator, and the volume equivalent to a 6-day supply, to licensee control. The proposed change also relocates the volume of diesel lube oil required to support 7-day operation of each onsite emergency diesel generator, and the volume equivalent to a 6-day supply, to licensee control. As the bases for the existing limits on diesel fuel oil and lube oil are not changed, no change is made to the accident analysis assumptions and no margin of safety is reduced as part of the change.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the

amendment request involves no significant hazards consideration.

Attorney for licensee: Peter M. Glass, Assistant General Counsel, Xcel Energy Services, Inc., 414 Nicollet Mall, Minneapolis, MN 55401.

NRC Branch Chief: Robert D. Carlson.

Southern Nuclear Operating Company, Inc., Docket Nos. 50–424 and 50–425, Vogtle Electric Generating Plant, Units 1 and 2, Burke County, Georgia

Date of amendment request: August 31, 2012.

Description of amendment request: The proposed amendments would revise Technical Specification (TS) 3.6.6, 3.7.5, 3.8.1, 3.8.9, and TS Example 1.3–3 by eliminating second Completion Times from the TSs. These changes are consistent with NRC-approved Industry/Technical Specification Task Force (TSTF) Traveler TSTF–439–A, Revision 2, ''Eliminate Second Completion Times Limiting Time from Discovery of Failure to Meet an LCO.'' Additionally, the proposed LAR will make an administrative revision to TS 3.6.6 by removing an obsolete note associated with Condition 3.6.6.A.

Basis for proposed no significant hazards consideration determination: As required 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration (NSHC).

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The change proposed by incorporating TSTF–439–A, Revision 2, eliminates certain Completion Times from the Technical Specifications. Completion Times are not an initiator to any accident previously evaluated. As a result, the probability of an accident previously evaluated is not affected. The consequences of an accident during the revised Completion Time are no different than the consequences of the same accident during the existing Completion Times. As a result, the consequences of an accident previously evaluated are not affected by this change. The proposed change does not alter or prevent the ability of structures, systems, and components (SSCs) from performing their intended function to mitigate the consequences of an initiating event within the assumed acceptance limits.

The proposed change described above does not affect the source term, containment isolation, or radiological release assumptions used in evaluating the radiological consequences of an accident previously evaluated. Further, the proposed change does not increase the types or amounts of radioactive effluent that may be released offsite, nor significantly increase individual or cumulative occupational/public radiation exposures. The proposed change is consistent with the safety analysis assumptions and resultant consequences. Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Additionally, the proposed change to delete the note from TS Condition 3.6.6.A is administrative in nature and does not impact the operation, physical configuration, or function of plant SSCs. The proposed change does not impact the initiators or assumptions of analyzed events, nor does the proposed change impact the mitigation of accidents or transient events.

Therefore, this proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes do not involve a physical alteration of the plant (i.e. no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. The proposed changes do not alter any assumptions made in the safety analysis.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed change to delete the second Completion Time does not alter the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined. The safety analysis acceptance criteria are not affected by this change. The proposed change will not result in plant operation in a configuration outside of the design basis. Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The proposed change to delete the note from TS Condition 3.6.6.A is administrative in nature and does not involve any physical changes to plant SSCs, or the manner in which SSCs are operated, maintained, modified, tested, or inspected. The proposed change does not involve a change to any safety limits, limiting safety system settings, limiting conditions of operation, or design parameters for any SSC. The proposed change does not impact any safety analysis assumptions and do not involve a change in initial conditions, system response times, or other parameters affecting any accident analysis. The proposed change will not result in plant operation in a configuration outside of the design basis.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. Arthur H. Domby, Troutman Sanders, NationsBank Plaza, Suite 5200, 600 Peachtree Street, NE., Atlanta, Georgia 30308–2216.

NRC Branch Chief: Robert J. Pascarelli.

Southern Nuclear Operating Company Docket Nos.: 52–025 and 52–026, Vogtle Electric Generating Plant (VEGP) Units 3 and 4, Burke County, Georgia

Date of amendment request: October 17, 2012.

Description of amendment request: The proposed change would amend Combined License Nos.: NPF–91 and NPF–92 for Vogtle Electric Generating Plant (VEGP) Units 3 and 4 in regard to the Turbine Building structures and layout by: (1) Changing the door location on the motor-driven fire pump room in the Turbine Building, (2) clarifying the column line designations for the southwest and southeast walls of the Turbine Building first bay, (3) changing the floor to ceiling heights at three different elevations in the Turbine Building main area, and (4) increasing elevations and wall thickness in certain walls of the Turbine Building first Bay.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed changes to the Turbine Building configuration do not alter the assumed initiators to any analyzed event. Changing the door location does not affect the operation of any systems or equipment inside or outside the Turbine Building that could initiate an analyzed accident. Clarifying the column line designations does not affect the operation of any systems or equipment inside or outside the Turbine Building that could initiate an analyzed accident. The changes in elevation and wall thickness do not affect the operation of any systems or equipment inside or outside the Turbine Building that could initiate an analyzed accident. In preparing this license amendment, it was considered if the changes to the Turbine Building door location, column line designations, wall thickness, and floor elevations would have an adverse impact on the ability of the Turbine Building structure to perform its design function to protect the systems, equipment, and components within this building. It was concluded that there was no adverse impact, because design of this structure, including the redesigned first bay wall heights and thicknesses, will continue to be in accordance with the same codes and

standards as stated in the VEGP Units 3 and 4 Updated Final Safety Analysis Report (UFSAR). The Turbine Building first bay continues to maintain its seismic Category II rating. Based on the above, the probability of an accident previously evaluated will not be increased by these proposed changes.

The proposed Turbine Building configuration changes will not affect radiological dose consequence analysis. The affected portions of the Turbine Building are unrelated to radiological analyses. Therefore, no accident source term parameter or fission product barrier is impacted by these changes. Structures, systems, and components (SSCs) required for mitigation of analyzed accidents are not affected by these changes, and the function of the Turbine Building to provide weather protection for SSCs inside the building is not adversely affected by these changes. Mitigation of a high energy line break (HELB) in the Turbine Building first bay is not adversely affected by this change, because additional vent area will be added to the south wall of the first bay above the Auxiliary Building roof. This additional vent area will exceed the vent area that is blocked by the change to the Turbine Building main area elevations. Consequently, this activity will not increase the consequences of any analyzed accident, including the main steam line limiting break.

Therefore, the proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed Turbine Building configuration changes to the location of a door leading to the Motor-Driven Fire Pump room, column line designations, floor elevations in the main area, and wall heights and thicknesses in the first bay do not change the design function of the Turbine Building or any of the systems or equipment in the Turbine Building or in any other Nuclear Island structures. In assessing the proposed changes, it was considered if they would lead to a different type of possible accident than those previously evaluated. The proposed changes do not adversely affect any system design functions or methods of operation. The proposed changes do not introduce any new equipment or components or change the operation of any existing systems or equipment in a manner that would result in a new failure mode, malfunction, or sequence of events that could affect safety-related or nonsafety-relate equipment. This activity will not create a new sequence of events that would result in significant fuel cladding failures. With the implementation of these changes to the design of this structure, including the redesigned first bay wall heights and thicknesses, the structure will continue to be in accordance with the same codes and standards as stated in the VEGP Units 3 and 4 UFSAR. The Turbine Building First Bay continues to maintain its seismic Category II rating. Based on the above, it was concluded that the proposed changes would not lead to a different type of possible accident than those previously considered.

Therefore, the proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The margin of safety for the design of the Turbine Building, including the seismic Category II Turbine Building first bay, is determined by the use of the current codes and standards and adherence to the assumptions used in the analyses of this structure and the events associated with this structure. The relocated door to the motor-driven fire pump room will continue to meet the current 3-hour fire rating requirements. The revised column line designations do not represent a physical plant modification, and have no adverse impact on plant construction or operation. The design of the Turbine Building, including the increased elevations in the main area and the increased height and thickness of the redesigned first bay walls, will continue to be in accordance with the same codes and standards as stated in the UFSAR. The increased elevation of the first bay roof to allow the installation of blow-out panels will provide additional gross vent area for the first bay, which more than compensates for the current vent area that will be blocked by the change in the Turbine Building main area elevations. Consequently, this activity will not adversely affect the first bay's ability to relieve pressure in the event of the limiting main steam line break, and consequently this activity will not reduce the current margin of safety associated with this event to the design pressure limits for Wall 11 of the Nuclear Island and the walls of the first bay. The first bay will continue to maintain a seismic Category II rating. Adhering to the same codes and standards for the Turbine Building structural design and maintaining a seismic Category II rating for the Turbine Building first bay preserves the current structural safety margins.

Therefore, the proposed amendment does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. M. Stanford Blanton, Balch & Bingham LLP, 1710 Sixth Avenue North, Birmingham, AL 35203–2015.

NRC Acting Branch Chief: Lawrence J. Burkhart.

Virginia Electric and Power Company, Docket Nos. 50–338 and 50–339, North Anna Power Station, Units 1 and 2, Louisa County, Virginia

Date of amendment request: September 27, 2012.

Description of amendment request: The proposed amendment changes the applicable Emergency Action Level for North Anna to include a 15-minute threshold for reactor coolant system leaks.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Criterion 1:

Does the proposed amendment involve a significant increase in the probability or consequence of an accident previously evaluated?

Response: No.

The change affects the North Anna [and Surry Power Station] Emergency Action Levels, but does not alter any of the requirements of the Operating License or the Technical Specifications. The proposed change does not modify any plant equipment and does not impact any failure modes that could lead to an accident. Additionally, the proposed change has no effect on the consequences of any analyzed accident since the change does not affect any equipment related to accident mitigation. Based on this discussion, the proposed amendment does not increase the probability or consequence of an accident previously evaluated.

Criterion 2:

Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The change affects the North Anna [and Surry Power Station] Emergency Action Levels, but does not alter any of the requirements of the Operating License or the Technical Specifications. It does not modify any plant equipment and there is no impact on the capability of the existing equipment to perform their intended functions. No system setpoints are being modified. No new failure modes are introduced by the proposed change. The proposed amendment does not introduce any accident initiators or malfunctions that would cause a new or different kind of accident.

Therefore, the proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

Criterion 3:

Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The change affects the North Anna [and Surry Power Station] Emergency Action Levels, but does not alter any of the requirements of the Operating License or the Technical Specifications. The proposed change does not affect any of the assumptions used in the accident analysis, nor does it affect any operability requirements for equipment important to plant safety.

Therefore, the proposed change will not result in a significant reduction in the margin of safety in operation of the facility as discussed in this license amendment request.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Lillian M. Cuoco, Senior Counsel, Dominion Resources Services, Inc., 120 Tredegar Street, RS–2, Richmond, VA 23219.

NRC Branch Chief: Robert J. Pascarelli.

Virginia Electric and Power Company, Docket Nos. 50–280 and 50–281, Surry Power Station, Units 1 and 2, Surry County, Virginia

Date of amendment request: September 27, 2012.

Description of amendment request: The proposed amendment changes the applicable Emergency Action Level for Surry Power Station (SPS) to include a 15-minute threshold for reactor coolant system leaks.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Criterion 1:

Does the proposed amendment involve a significant increase in the probability or consequence of an accident previously evaluated?

Response: No.

The change affects the [North Anna and] Surry Power Station Emergency Action Levels, but does not alter any of the requirements of the Operating License or the Technical Specifications. The proposed change does not modify any plant equipment and does not impact any failure modes that could lead to an accident. Additionally, the proposed change has no effect on the consequences of any analyzed accident since the change does not affect any equipment related to accident mitigation. Based on this discussion, the proposed amendment does not increase the probability or consequence of an accident previously evaluated.

Criterion 2:

Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The change affects the [North Anna and] Surry Power Station Emergency Action Levels, but does not alter any of the requirements of the Operating License or the Technical Specifications. It does not modify any plant equipment and there is no impact on the capability of the existing equipment to perform their intended functions. No system setpoints are being modified. No new failure modes are introduced by the proposed change. The proposed amendment does not introduce any accident initiators or malfunctions that would cause a new or different kind of accident.

Therefore, the proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

Criterion 3:

Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The change affects the [North Anna and] Surry Power Station Emergency Action Levels, but does not alter any of the requirements of the Operating License or the Technical Specifications. The proposed change does not affect any of the assumptions used in the accident analysis, nor does it affect any operability requirements for equipment important to plant safety. Therefore, the proposed change will not result in a significant reduction in the margin of safety in operation of the facility as discussed in this license amendment request.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Lillian M. Cuoco, Senior Counsel, Dominion Resources Services, Inc., 120 Tredegar St., RS–2, Richmond, VA 23219.

NRC Branch Chief: Robert J. Pascarelli.

Wolf Creek Nuclear Operating Corporation, Docket No. 50–482, Wolf Creek Generating Station, Coffey County, Kansas

Date of amendment request: October 18, 2012.

Description of amendment request: The amendment would revise Paragraph 2.C(5)(a) of the renewed facility operating license and the fire protection program as described in the Updated Safety Analysis Report (USAR) to allow a deviation from the separation requirements of 10 CFR Part 50, Appendix R, Section III.G.2, as documented in Appendix 9.5E of the Wolf Creek Generating Station USAR, for the volume control tank outlet valves.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The design function of structures, systems and components (SSCs) are not impacted by the proposed change. An evaluation of not maintaining the 10 CFR Part 50, Appendix R, Section III.G.2, separation requirements for the volume, control tank outlet valves and associated circuits determined that the fire protection features provided in fire area A–8 as well as the low fixed combustible loading provides reasonable assurance that at least one valve will respond to a close signal from the control room following a credible fire in the area. The proposed change does not alter or prevent the ability of SSCs from performing their intended function to mitigate the consequences of an initiating event within the assumed acceptance limits. Therefore, the probability of any accident previously evaluated is not increased. Equipment required to mitigate an accident remains capable of performing the assumed function.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change will not alter the requirements or function for systems required during accident conditions. An evaluation of not maintaining the 10 CFR Part 50, Appendix R, Section llI.G.2, separation requirements for the volume control tank outlet valves and associated circuits determined that the fire protection features provided in fire area A–8 as well as the low fixed combustible loading provides reasonable assurance that at least one valve will respond to a close signal from the control room following a credible fire in the area. The design function of structures, systems and components are not impacted by the proposed change.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

There will be no effect on the manner in which safety limits or limiting safety system settings are determined nor will there be any effect on those plant systems necessary to assure the accomplishment of protection functions. There will be no impact on departure from nuclear boiling ratio (DNBR) limits, heat flux hot channel factor ($F_Q(Z)$) limits, nuclear enthalpy rise hot channel factor ($F^N\Delta_H$) limits, peak centerline temperature (PCT) limits, peak local power density or any other margin of safety.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the

amendment request involves no significant hazards consideration.

Attorney for licensee: Jay Silberg, Esq., Pillsbury Winthrop Shaw Pittman, LLP., 2300 N Street NW., Washington, DC 20037.

NRC Branch Chief: Michael T. Markley.

Notice of Issuance of Amendments to Facility Operating Licenses and Combined Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

A notice of consideration of issuance of amendment to facility operating license or combined license, as applicable, proposed no significant hazards consideration determination, and opportunity for a hearing in connection with these actions, was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.22(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) The applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the NRC's Public Document Room (PDR), located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available documents created or received at the NRC are accessible electronically through the Agencywide Documents Access and Management System (ADAMS) in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR's Reference staff at 1–800–397–4209, 301–415–4737 or by email to *pdr.resource@nrc.gov.*

NextEra Energy Point Beach, LLC, Docket Nos. 50–266 and 50–301, Point Beach Nuclear Plant, Units 1 and 2, Town of Two Creeks, Manitowoc County, Wisconsin

Date of application for amendments: June 18, 2012, as supplemented on September 17, 2012.

Brief description of amendments: The amendments approved a change in scope of Cyber Security Plan Implementation Milestone 6, and revise License Condition 4.D, ''Physical Protection,'' of the Renewed Facility Operating Licenses for the Point Beach Nuclear Plant, Units 1 and 2.

Date of issuance: November 23, 2012.

Effective date: As of the date of issuance and shall be implemented by December 31, 2012.

Amendment Nos.: 247 (Unit 1) and 251 (Unit 2).

Renewed Facility Operating License Nos. DPR–24 and DPR–27: Amendments revised the Renewed Facility Operating License.

Date of initial notice in **Federal Register:** September 11, 2012 (77 FR 55873).

The licensee's September 17, 2012, supplemental letter contained clarifying information, did not change the scope of the original amendment request, did not change the NRC staff's initial proposed finding of no significant hazards consideration determination, and did not expand the scope of the original **Federal Register** notice.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated November 23, 2012.

No significant hazards consideration comments received: No.

Virginia Electric and Power Company, Docket Nos. 50–338 and 50–339, North Anna Power Station, Units 1 and 2, Louisa County, Virginia

Date of application for amendment: April 2, 2012.

Brief description of amendment: The amendments revised the Technical Specifications (TSs) by deleting the Steam Generator Water Level Low Coincident with Steam Flow/Feedwater Flow Mismatch Reactor Trip Function from the TS Table 3.3.1–1 Item 15.

Date of issuance: November 20, 2012.

Effective date: As of the date of issuance and shall be implemented during Fall 2013 refueling outage for Unit 1 and during Spring 2013 refueling outage for Unit 2.

Amendment Nos.: Unit 1—268 and Unit 2—249.

Renewed Facility Operating License Nos. NPF–4 and NPF–7: Amendments changed the licenses and the technical specifications.

Date of initial notice in **Federal Register:** June 12, 2012 (77 FR 35076).

The supplement dated August 6, 2012, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated November 20, 2012.

No significant hazards consideration comments received: No.

Wolf Creek Nuclear Operating Corporation, Docket No. 50–482, Wolf Creek Generating Station, Coffey County, Kansas

Date of amendment request: April 26, 2012.

Brief description of amendment: The amendment revised the Technical Specifications (TSs) to adopt NRC-approved Technical Specifications Task Force (TSTF) Change Traveler TSTF–510, Revision 2, ''Revision to Steam Generator Program Inspection Frequencies and Tube Sample Selection,'' using the consolidated line item improvement process (CLIIP). Specifically, the amendment revised TS 3.4.17, ''Steam Generator (SG) Tube Integrity,'' TS 5.5.9, ''Steam Generator (SG) Program,'' and TS 5.6.10, ''Steam Generator Tube Inspection Report,'' and included TS Bases changes that summarize and clarify the purpose of the TS.

Date of issuance: November 19, 2012.

Effective date: As of the date of issuance and shall be implemented within 90 days from the date of issuance.

Amendment No.: 199.

Renewed Facility Operating License No. NPF–42. The amendment revised the Operating License and Technical Specifications.

Date of initial notice in ***Federal Register:*** September 4, 2012 (77 FR 53931).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 19, 2012.

No significant hazards consideration comments received: No.

Dated at Rockville, Maryland, this 30th day of November 2012.

For the Nuclear Regulatory Commission.

Michele G. Evans,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2012–29612 Filed 12–10–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Federal Register Notice

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission [NRC–2012–0002].

DATES: Weeks of December 10, 17, 24, 31, 2012, January 7, 14, 2013.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of December 10, 2012

There are no meetings scheduled for the week of December 10, 2012.

Week of December 17, 2012—Tentative

There are no meetings scheduled for the week of December 17, 2012.

Week of December 24, 2012—Tentative

There are no meetings scheduled for the week of December 24, 2012.

Week of December 31, 2012—Tentative

There are no meetings scheduled for the week of December 31, 2012.

Week of January 7, 2013—Tentative

Tuesday, January 8, 2013

9:00 a.m. Briefing on Fort Calhoun (Public Meeting). (Contact: Michael Hay, 817–200–1527).

This meeting will be webcast live at the Web address—*www.nrc.gov*.

Week of January 14, 2013—Tentative

There are no meetings scheduled for the week of January 14, 2013.

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* The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—301–415–1292. Contact person for more information: Rochelle Bavol, 301–415–1651.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/public-involve/public-meetings/schedule.html*.

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The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify Bill Dosch, Chief, Work Life and Benefits Branch, at 301–415–6200, TDD: 301–415–2100, or by email at *william.dosch@nrc.gov*. Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed electronically to subscribers. If you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969), or send an email to *darlene.wright@nrc.gov*.

Dated: December 6, 2012.

Rochelle C. Bavol,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2012–29954 Filed 12–7–12; 4:15 pm]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Privacy Act of 1974: Update Existing System of Records

AGENCY: U.S. Office of Personnel Management.

ACTION: Update OPM/GOVT–1, General Personnel Records.

SUMMARY: The U.S. Office of Personnel Management (OPM) proposes to update OPM/GOVT–1, General Personnel Records, System of Records. This action is necessary to meet the requirements of the Privacy Act to publish in the **Federal Register** notice of the existence and character of records maintained by the agency (5 U.S.C. 552a(e)(4)) and (11).

DATES: This action will be effective without further notice on January 10, 2013 unless comments are received that would result in a contrary determination.

ADDRESSES: Send written comments to the U.S. Office of Personnel Management, Manager, OCIO/RM, 1900 E Street NW., Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: U.S. Office of Personnel Management, Manager, OCIO/RM, 1900 E Street NW., Washington, DC 20415.

SUPPLEMENTARY INFORMATION: The OPM system of record notice subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, has been published in the **Federal Register**. The proposed changes include the following: (1) Adding *a reference to* OPM's ''Guide to Data Standards'' to the ''Categories of Records in the System,'' (2) adding Enterprise Human Resource Integration (EHRI) to Categories of Records in the System (g), (3) shortening existing Note ''8,'', (4) adding routine use ''qq'' To disclose foreign language proficiencies to Federal agencies in support of the National Preparedness Goal and the Presidential Policy Directive 8 (PPD–8), and (5) adding routine use ''rr'' To disclose information to the Centers for Medicare and Medicaid (CMS) to assist in determining whether individuals are eligible for programs under the Patient Protection and Affordable Care Act (PPACA).

U.S. Office of Personnel Management.

John Berry,

Director.

OPM/GOVT–1

SYSTEM NAME:

General Personnel Records.

SYSTEM LOCATION:

Records on current Federal employees are located within the employing agency.

Records maintained in paper may also be located at OPM or with personnel officers, or at other designated offices of local installations of the department or agency that employs the individual. When agencies determine that duplicates of these records need to be located in a second office, e.g., an administrative office closer to where the employee actually works, such copies are covered by this system. Some agencies have employed the Enterprise Human Resource Integration (EHRI) data system to store their records electronically. Although stored in EHRI, agencies are still responsible for the maintenance of their records.

Former Federal employees' paper Official Personnel Folders (OPFs) are located at the National Personnel Records Center, National Archives and Records Administration (NARA), 111 Winnebago Street, St. Louis, Missouri 63118. Former Federal employees' electronic Official Personnel Folders (eOPF) are located in the EHRI data system that is administered by NARA.

Note 1—The records in this system are records of the OPM and must be provided to those OPM employees who have an official need or use for those records. Therefore, if an employing agency is asked by an OPM employee to access the records within this system, such a request must be honored.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Current and former Federal employees as defined in 5 U.S.C. 2105.

(Volunteers, grantees, and contract employees on whom the agency maintains records may also be covered by this system).

CATEGORIES OF RECORDS IN THE SYSTEM:

All categories of records may include identifying information, such as name(s), date of birth, home address, mailing address, social security number, and home telephone. This system includes, but is not limited to, contents of the OPF as specified in OPM's Operating Manual, ''The Guide to Personnel Recordkeeping'' and OPM's ''Guide to Data Standards.'' Records in this system include:

a. Records reflecting work experience, education level achieved, and specialized education or training obtained outside of Federal service.

b. Records reflecting Federal service and documenting work experience and specialized education received while employed. Such records contain information about past and present positions held; grades; salaries; duty station locations; and notices of all personnel actions, such as appointments, transfers, reassignments, details, promotions, demotions, reductions-in-force, resignations, separations, suspensions, OPM approval of disability retirement applications, retirement, and removals.

c. Records on participation in the Federal Employees' Group Life Insurance Program and Federal Employees Health Benefits Program.

d. Records relating to an Intergovernmental Personnel Act assignment or Federal-private sector exchange program.

Note 2—Some of these records may also become part of the OPM/CENTRAL–5, Intergovernmental Personnel Act Assignment Record system.

e. Records relating to participation in an agency Federal Executive or Senior Executive Service (SES) Candidate Development Program.

Note 3—Some of these records may also become part of the OPM/Central-10 Federal Executive Institute Program Participant Records and OPM/CENTRAL–13 Executive Personnel Records systems.

f. Records relating to Government-sponsored training or participation in an agency's Upward Mobility Program or other personnel program designed to broaden an employee's work experiences and for purposes of advancement (e.g., an administrative intern program).

g. Records contained in the Enterprise Human Resource Integration (EHRI) and Central Personnel Data File (CPDF) maintained by OPM and exact substantive representations in agency manual or automated personnel information systems. These data elements include many of the above records along with disability, race/ethnicity, national origin, pay, and performance information from other OPM and agency systems of records. A definitive list of EHRI and CPDF data elements is contained in OPM's Operating Manuals, The Guide to Central Personnel Data File Reporting Requirements and The Guide to Personnel Data Standards.

h. Records on the SES maintained by agencies for use in making decisions affecting incumbents of these positions, e.g., relating to sabbatical leave programs, reassignments, and details, that are perhaps unique to the SES and that may be filed in the employee's OPF. These records may also serve as the basis for reports submitted to OPM for implementing OPM's oversight responsibilities concerning the SES.

i. Records on an employee's activities on behalf of the recognized labor organization representing agency employees, including accounting of official time spent and documentation in support of per diem and travel expenses.

Note 4—Alternatively, such records may be retained by an agency payroll office and thus be subject to the agency's internal Privacy Act system for payroll records. The OPM/GOVT–1 system does not cover general agency payroll records.

j. To the extent that the records listed here are also maintained in an agency electronic personnel or microform records system, those versions of these records are considered to be covered by this system notice. Any additional copies of these records (excluding performance ratings of record and conduct-related documents maintained by first line supervisors and managers covered by the OPM/GOVT–2 system) maintained by agencies at remote field/administrative offices from where the original records exist are considered part of this system.

Note 5—It is not the intent of OPM to limit this system of records only to those records physically within the OPF. Records may be filed in other folders located in offices other than where the OPF is located. Further, as indicated in the records location section, some of these records may be duplicated for maintenance at a site closer to where the employee works (e.g., in an administrative office or supervisors work folder) and still be covered by this system. In addition, a working file that a supervisor or other agency official is using that is derived from OPM/GOVT–1 is covered by this system notice. This system also includes working files derived from this notice that management is using in its personnel management capacity.

k. Records relating to designations for lump sum death benefits.

l. Records relating to classified information nondisclosure agreements.

m. Records relating to the Thrift Savings Plan (TSP) concerning the starting, changing, or stopping of contributions to the TSP as well as how the individual wants the investments to be made in the various TSP Funds.

Note 6—CPDF and EHRI data system's Central Employee Record (CER) are part of OPM/GOVT–1 system of records. CPDF and CER are highly reliable sources of statistical data on the workforce of the Federal government. However, the accuracy and completeness of each data element within the individual records that comprise the aggregate files are not guaranteed, and should not be used as the sole tool or as a substitute for the OPF in making personnel determinations or decisions concerning individuals.

Note 7—The eOPF Application within EHRI may contain documents and information beyond the scope and requirements of the OPF as documented in OPM's Guide to Personnel Recordkeeping. Those documents and information in the eOPF Application that are beyond the scope of the documented requirements are not considered part of the OPF or OPM/GOVT–1,

n. Records maintained in accordance with E.O. 13490, section 4(e), January 21, 2009. These records include the ethics pledges and all pledge waiver certifications with respect thereto.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM INCLUDES THE FOLLOWING WITH ANY REVISIONS OR AMENDMENTS:

5 U.S.C. 1302, 2951, 3301, 3372, 4118, 8347, and Executive Orders 9397, as amended by 13478, 9830, and 12107.

Purposes:

The OPF, which may exist in various approved media, and other general personnel records files, is the official repository of the records, reports of personnel actions, and the documentation required in connection with these actions affected during an employee's Federal service. The personnel action reports and other

documents, some of which are filed in the OPF, give legal force and effect to personnel transactions and establish employee rights and benefits under pertinent laws and regulations governing Federal employment.

These files and records are maintained by OPM and agencies in accordance with OPM regulations and instructions. They provide the basic source of factual data about a person's Federal employment while in the service and after his or her separation. Records in this system have various uses by agency personnel offices, including screening qualifications of employees; determining status, eligibility, and employee's rights and benefits under pertinent laws and regulations governing Federal employment; computing length of service; and other information needed to provide personnel services. These records may also be used to locate individuals for personnel research.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEMS, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

These records and information in these records may be used—

a. To disclose information to Government training facilities (Federal, State, and local) and to non-Government training facilities (private vendors of training courses or programs, private schools, etc.) for training purposes.

b. To disclose information to education institutions on appointment of a recent graduate to a position in the Federal service, and to provide college and university officials with information about their students working in the Student Career Experience Program, Volunteer Service, or other similar programs necessary to a student's obtaining credit for the experience gained.

c. To disclose information to officials of foreign governments for clearance before a Federal employee is assigned to that country.

d. To disclose information to the Department of Labor, Department of Veterans Affairs, Social Security Administration, Department of Defense, or any other Federal agencies that have special civilian employee retirement programs; or to a national, State, county, municipal, or other publicly recognized charitable or income security administration agency (e.g., State unemployment compensation agencies), when necessary to adjudicate a claim under the retirement, insurance, unemployment, or health benefits programs of the OPM or an agency cited above, or to an agency to conduct an analytical study or audit of benefits being paid under such programs.

e. To disclose information necessary to the Office of Federal Employees Group Life Insurance to verify election, declination, waiver of regular and/or optional life insurance coverage, or eligibility for payment of a claim for life insurance, or to TSP to verify election change and designation of beneficiary.

f. To disclose, to health insurance carriers contracting with OPM to provide a health benefits plan under the Federal Employees Health Benefits Program, information necessary to identify enrollment in a plan, to verify eligibility for payment of a claim for health benefits, or to carry out the coordination or audit of benefit provisions of such contracts.

g. To disclose information to a Federal, State, or local agency for determination of an individual's entitlement to benefits in connection with Federal Housing Administration programs.

h. To consider and select employees for incentive awards and other honors and to publicize those granted. This may include disclosure to other public and private organizations, including news media, which grant or publicize employee recognition.

i. To consider employees for recognition through quality-step increases and to publicize those granted. This may include disclosure to other public and private organizations, including news media, which grant or publicize employee recognition.

j. To disclose information to officials of labor organizations recognized under 5 U.S.C. chapter 71 when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices, and matters affecting working conditions.

Note 8—Home addresses will be released from this system only when there are no adequate, alternative sources available for this information.

k. To disclose pertinent information to the appropriate Federal, State, or local agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order, when the disclosing agency becomes aware of an indication of a violation or potential violation of civil or criminal law or regulation.

l. To disclose information to any source from which additional information is requested (to the extent necessary to identify the individual, inform the source of the purpose(s) of the request, and to identify the type of information requested), when necessary to obtain information relevant to an agency decision to hire or retain an employee, issue a security clearance, conduct a security or suitability investigation of an individual, classify jobs, let a contract, or issue a license, grant, or other benefits.

Note 9—When copies of records become part of an investigative process, those copies become subject to that systems' notice covering the investigative process i.e., if during an investigation, the OPM Federal Investigative Services Division makes copies of records contained in an Official Personnel Folder; those documents become part of OPM Central—9 Personnel Investigation Records system of records and are subject to that systems' routine uses.

m. To disclose to a Federal agency in the executive, legislative, or judicial branch of Government, in response to its request, or at the initiation of the agency maintaining the records, information in connection with the hiring of an employee, the issuance of a security clearance or determination concerning eligibility to hold a sensitive position, the conducting of an investigation for purposes of a credentialing, national security, fitness, or suitability adjudication concerning an individual, the classifying or designation of jobs, the letting of a contract, the issuance of a license, grant, or other benefit by the requesting agency, or the lawful statutory, administrative, or investigative purpose of the agency to the extent that the information is relevant and necessary to the requesting agency's decision.

n. To disclose information to the Office of Management and Budget at any stage in the legislative coordination and clearance process in connection with private relief legislation as set forth in OMB Circular No. A–19.

o. To provide information to a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual.

p. To disclose information to another Federal agency, to a court, or a party in litigation before a court or in an administrative proceeding being conducted by a Federal agency, when the Government is a party to the judicial or administrative proceeding.

q. To disclose information to the Department of Justice, or in a proceeding before a court, adjudicative body, or other administrative body before which the agency is authorized to appear, when:

1. The agency, or any component thereof; or

2. Any employee of the agency in his or her official capacity; or

3. Any employee of the agency in his or her individual capacity where the Department of Justice or the agency has agreed to represent the employee; or

4. The United States, when the agency determines that litigation is likely to affect the agency or any of its components, is a party to litigation or has an interest in such litigation, and the use of such records by the Department of Justice or the agency is deemed by the agency to be relevant and necessary to the litigation provided, however, that in each case it has been determined that the disclosure is compatible with the purpose for which the records were collected.

r. By the National Archives and Records Administration in records management inspections and its role as Archivist.

s. By the agency maintaining the records or by the OPM to locate individuals for personnel research or survey response, and in the production of summary descriptive statistics and analytical studies in support of the function for which the records are collected and maintained, or for related workforce studies. While published statistics and studies do not contain individual identifiers, in some instances, the selection of elements of data included in the study may be structured in such a way as to make the data individually identifiable by inference.

t. To provide an official of another Federal agency information needed in the performance of official duties related to reconciling or reconstructing data files, in support of the functions for which the records were collected and maintained.

u. When an individual to whom a record pertains is mentally incompetent or under other legal disability, to provide information in the individual's record to any person who is responsible for the care of the individual, to the extent necessary to assure payment of benefits to which the individual is entitled.

v. To disclose to the agency-appointed representative of an employee all notices, determinations, decisions, or other written communications issued to the employee in connection with an examination ordered by the agency under fitness-for-duty examination procedures.

w. To disclose, in response to a request for discovery or for appearance of a witness, information that is relevant to the subject matter involved in a pending judicial or administrative proceeding.

x. To disclose to a requesting agency, organization, or individual the home address and other relevant information on those individuals who it reasonably believed might have contracted an illness or might have been exposed to or suffered from a health hazard while employed in the Federal workforce.

y. To disclose specific civil service employment information required under law by the Department of Defense on individuals identified as members of the Ready Reserve to assure continuous mobilization readiness of Ready Reserve units and members, and to identify demographic characteristics of civil service retirees for national emergency mobilization purposes.

z. To disclose information to the Department of Defense, National Oceanic and Atmospheric Administration, U.S. Public Health Service, Department of Veterans Affairs, and the U.S. Coast Guard needed to effect any adjustments in retired or retained pay required by the dual compensation provisions of section 5532 of title 5, United States Code.

aa. To disclose information to the Merit Systems Protection Board or the Office of the Special Counsel in connection with appeals, special studies of the civil service and other merit systems, review of OPM rules and regulations, investigation of alleged or possible prohibited personnel practices, and such other functions promulgated in 5 U.S.C. chapter 12, or as may be authorized by law.

bb. To disclose information to the Equal Employment Opportunity Commission when requested in connection with investigations of alleged or possible discrimination practices in the Federal sector, examination of Federal affirmative employment programs, compliance by Federal agencies with the Uniform Guidelines on Employee Selection Procedures, or other functions vested in the Commission.

cc. To disclose information to the Federal Labor Relations Authority (including its General Counsel) when requested in connection with investigation and resolution of allegations of unfair labor practices, in connection with the resolution of exceptions to arbitrator's awards when a question of material fact is raised, to investigate representation petitions and to conduct or supervise representation elections, and in connection with matters before the Federal Service Impasses Panel.

dd. To disclose to prospective non-Federal employers, the following information about a specifically identified current or former Federal employee:

(1) Tenure of employment;

(2) Civil service status;

(3) Length of service in the agency and the Government; and

(4) When separated, the date and nature of action as shown on the Notification of Personnel Action—Standard Form 50 (or authorized exception).

ee. To disclose information on employees of Federal health care facilities to private sector (i.e., other than Federal, State, or local government) agencies, boards, or commissions (e.g., the Joint Commission on Accreditation of Hospitals). Such disclosures will be made only when the disclosing agency determines that it is in the Government's best interest (e.g., to comply with law, rule, or regulation, to assist in the recruiting of staff in the community where the facility operates to obtain accreditation or other approval rating, or to avoid any adverse publicity that may result from public criticism of the facility's failure to obtain such approval). Disclosure is to be made only to the extent that the information disclosed is relevant and necessary for that purpose.

ff. To disclose information to any member of an agency's Performance Review Board, Executive Resources Board, or other panel when the member is not an official of the employing agency; information would then be used for approving or recommending selection of candidates for executive development or SES candidate programs, issuing a performance rating of record, issuing performance awards, nominating for meritorious or distinguished executive ranks, or removal, reduction-in-grade, or other personnel actions based on performance.

gg. To disclose, either to the Federal Acquisition Institute (FAI) or its agent, information about Federal employees in procurement occupations and other occupations whose incumbents spend the predominant amount of their work hours on procurement tasks; provided that the information shall be used only for such purposes and under such conditions as prescribed by the notice of the Federal Acquisition Personnel Information System as published in the **Federal Register** of February 7, 1980 (45 FR 8399).

hh. To disclose relevant information with personal identifiers of Federal civilian employees whose records are contained in the EHRI to authorized Federal agencies and non-Federal entities for use in computer matching. The matches will be performed to help eliminate waste, fraud, and abuse in Governmental programs; to help identify individuals who are potentially

in violation of civil or criminal law or regulation; and to collect debts and overpayments owed to Federal, State, or local governments and their components. The information disclosed may include, but is not limited to, the name, social security number, date of birth, sex, annualized salary rate, service computation date of basic active service, veteran's preference, retirement status, occupational series, health plan code, position occupied, work schedule (full time, part time, or intermittent), agency identifier, geographic location (duty station location), standard metropolitan service area, special program identifier, and submitting office number of Federal employees.

ii. To disclose information to Federal, State, local, and professional licensing boards, Boards of Medical Examiners, or to the Federation of State Medical Boards or a similar non-government entity which maintains records concerning individuals' employment histories or concerning the issuance, retention or revocation of licenses, certifications or registration necessary to practice an occupation, profession or specialty, to obtain information relevant to an Agency decision concerning the hiring, retention, or termination of an employee or to inform a Federal agency or licensing boards or the appropriate non-government entities about the health care practices of a terminated, resigned or retired health care employee whose professional health care activity so significantly failed to conform to generally accepted standards of professional medical practice as to raise reasonable concern for the health and safety of patients in the private sector or from another Federal agency.

jj. To disclose information to contractors, grantees, or volunteers performing or working on a contract, service, grant, cooperative agreement, or job for the Federal Government.

kk. To disclose information to a Federal, State, or local governmental entity or agency (or its agent) when necessary to locate individuals who are owed money or property either by a Federal, State, or local agency, or by a financial or similar institution.

ll. To disclose to a spouse or dependent child (or court-appointed guardian thereof) of a Federal employee enrolled in the Federal Employees Health Benefits Program, upon request, whether the employee has changed from a self-and-family to a self-only health benefits enrollment.

mm. To disclose information to the Office of Child Support Enforcement, Administration for Children and Families, Department of Health and Human Services, Federal Parent Locator System, or Federal Offset System for use in locating individuals, verifying social security numbers, or identifying their incomes sources to establish paternity, establish, or modify orders of support and for enforcement action.

nn. To disclose records on former Panama Canal Commission employees to the Republic of Panama for use in employment matters.

oo. To disclose to appropriate Federal officials pertinent workforce information for use in national or homeland security emergency/disaster response.

pp. To disclose on public and internally-accessible Federal Government Web sites, and to otherwise disclose to any person, including other departments and agencies, the signed ethics pledges and pledge waiver certifications issued under E.O. 13490 of January 21, 2009, Ethics Commitments by Executive Branch Personnel.

qq. To disclose foreign language proficiencies to Federal agencies in support of the National Preparedness Goal and the Presidential Policy Directive 8 (PPD–8).

rr. To disclose information to the Centers for Medicare and Medicaid (CMS) to assist in determining whether individuals are eligible for programs under the Patient Protection and Affordable Care Act (PPACA).

POLICIES AND PRACTICES OF STORING, RETRIEVING, SAFEGUARDING, AND RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

These records are maintained in file folders, on lists and forms, microfilm or microfiche, and in computer processable storage media such as personnel system databases, PDF forms and data warehouse systems.

RETRIEVABILITY:

These records are retrieved by various combinations of name, agency, birth date, social security number, or identification number of the individual on whom they are maintained.

SAFEGUARDS:

Paper or microfiche/microfilmed records are located in locked metal file cabinets or in secured rooms with access limited to those personnel whose official duties require access. Access to computerized records is limited, through use of user logins and passwords, access codes, and entry logs, to those whose official duties require access. Computerized records systems are consistent with the requirements of the Federal Information Security Management Act (Pub. L. 107–296), and associated OMB policies, standards and guidance from the National Institute of Standards and Technology.

RETENTION AND DISPOSAL:

The OPF is maintained for the period of the employee's service in the agency and is then, if in a paper format, transferred to the National Personnel Records Center for storage or, as appropriate, to the next employing Federal agency. If the OPF is maintained in an electronic format, the transfer and storage is in accordance with the OPM approved electronic system. Other records are either retained at the agency for various lengths of time in accordance with the National Archives and Records Administration records schedules or destroyed when they have served their purpose or when the employee leaves the agency. The transfer occurs within 90 days of the individuals' separation. In the case of administrative need, a retired employee, or an employee who dies in service, the OPF is sent within 120 days. Destruction of the OPF is in accordance with General Records Schedule-1 (GRS–1) or GRS 20.

Records contained within the CPDF and EHRI (and in agency's automated personnel records) may be retained indefinitely as a basis for longitudinal work history statistical studies. After the disposition date in GRS–1 or GRS 20, such records should not be used in making decisions concerning employees.

SYSTEM MANAGER AND ADDRESS:

a. Manager, OCIO/RM, U.S. Office of Personnel Management, 1900 E Street NW., Washington, DC 20415.

b. For current Federal employees, OPM has delegated to the employing agency the Privacy Act responsibilities concerning access, amendment, and disclosure of the records within this system notice.

NOTIFICATION PROCEDURE:

Individuals wishing to inquire whether this system of records contains information about them should contact the appropriate OPM or employing agency office, as follows:

a. Current Federal employees should contact the Personnel Officer or other responsible official (as designated by the employing agency), of the local agency installation at which employed regarding records in this system.

b. Former Federal employees who want access to their Official Personnel Folders (OPF) should contact the National Personnel Records Center (Civilian), 111 Winnebago Street, St. Louis, Missouri 63118, regarding the records in this system. For other records

covered by the system notice, individuals should contact their former employing agency. Individuals must furnish the following information for their records to be located and identified:

a. Full name.

b. Date of birth.

c. Social security number.

d. Last employing agency (including duty station) and approximate date(s) of the employment (for former Federal employees).

e. Signature.

RECORD ACCESS PROCEDURE:

Individuals wishing to request access to their records should contact the appropriate OPM or agency office, as specified in the Notification Procedure section. Individuals must furnish the following information for their records to be located and identified:

a. Full name(s).

b. Date of birth.

c. Social security number.

d. Last employing agency (including duty station) and approximate date(s) of employment (for former Federal employees).

e. Signature.

Individuals requesting access must also comply with the Office's Privacy Act regulations on verification of identity and access to records (5 CFR part 297).

CONTESTING RECORD PROCEDURE:

Current employees wishing to request amendment of their records should contact their current agency. Former employees should contact the system manager. Individuals must furnish the following information for their records to be located and identified.

a. Full name(s).

b. Date of birth.

c. Social security number.

d. Last employing agency (including duty station) and approximate date(s) of employment (for former Federal employees).

e. Signature.

Individuals requesting amendment must also comply with the Office's Privacy Act regulations on verification of identity and amendment of records (5 CFR part 297).

RECORD SOURCE CATEGORIES:

Information in this system of records is provided by—

a. The individual on whom the record is maintained.

b. Educational institutions.

c. Agency officials and other individuals or entities.

d. Other sources of information maintained in an employee's OPF, in accordance with Code of Federal Regulations Part 293, and OPM's Operating Manual, ''The Guide to Personnel Recordkeeping.''

[FR Doc. 2012–29777 Filed 12–10–12; 8:45 am]

BILLING CODE 6325–45–P

POSTAL REGULATORY COMMISSION

[Docket No. CP2013–24; Order No. 1566]

International Mail Contract

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing concerning an additional inbound competitive Multi-Service Agreements with Foreign Postal Operators 1 negotiated service agreement with Royal PostNL BV. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* December 14, 2012.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction

On December 4, 2012, the Postal Service filed a notice, pursuant to 39 CFR 3015.5, stating that it has entered into an additional negotiated service agreement (Agreement) with the Netherlands' foreign postal operator Royal PostNL BV (PostNL).[1] The Postal Service seeks to have the inbound portion of the Agreement, which concerns delivery of inbound Air CP [2] and EMS in the United States, included within the Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 (MC2010–34) product on the competitive product list. Notice at 1.

II. Contents of Filing

The Postal Service's filing consists of the Notice, a public Excel file containing redacted financial workpapers, and four attachments. Attachment 1 is a redacted copy of the Agreement. *Id.* at 3. Attachment 2 is the certified statement required by 39 CFR 3015.5(c)(2). *Id.* Attachment 3 is a redacted copy of the Governors' Decision No. 10–3. *Id.* Attachment 4 is an application for non-public treatment of unredacted material. *Id.* The Agreement's intended effective date is January 1, 2013. *Id.* at 4.

The rates for inbound Air CP and EMS included in the Agreement are to remain in effect for 2 years after the Agreement's effective date, unless terminated sooner. *Id.* The Postal Service further notes that a TNT Agreement, in accordance with Article 22 of the TNT Agreement, automatically renewed on October 1, 2012, but pursuant to paragraph 3 of Article 22 of the PostNL Agreement, the TNT Agreement is to expire the day prior to the effective date of the PostNL Agreement, if an effective date for the PostNL agreement is established. *Id.* at 3 n.5.

The Postal Service reviews the regulatory history of the Inbound Competitive Multi-Service Agreements with Foreign Operators 1 product and identifies the TNT Agreement (approved in Docket No. CP2010–95) as the baseline agreement for purposes of determining the functional equivalence of the instant Agreement.[3] *Id.* at 2. It asserts that the instant Agreement fits within applicable Mail Classification Schedule language and addresses functional equivalency with the baseline agreement, including similarity of cost characteristics. *Id.* at 3–7. The Postal Service also identifies differences between the two contracts, such as the addition of several articles, revisions to existing articles, and new annexes, but asserts that these differences do not detract from a finding of functional equivalency. *Id.* at 5–7.

III. Commission Action

Notice of establishment of docket. The Commission establishes Docket No. CP2013–24 for consideration of matters

[1] Notice of United States Postal Service of Filing Functionally Equivalent Inbound Competitive Multi-Service Agreement with a Foreign Postal Operator, December 4, 2012 (Notice).

[2] ''CP'' is an abbreviation used to identify or reference international parcel post (from the French phrase *colis postaux,* ''postal package'').

[3] The Postal Service identifies Governors' Decision No. 10–3 as the enabling Governors' Decision. *Id.* at 5. The status of the TNT Agreement as the baseline agreement was confirmed in Docket No. CP2011–69, Order No. 840, Order Concerning an Additional Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 Negotiated Service Agreement, September 7, 2011. *See id.* at 2.

raised by the Notice. The Commission appoints James F. Callow to serve as Public Representative in this docket. Interested persons may submit comments on whether the Postal Service's filing in the captioned docket is consistent with the policies of 39 U.S.C. 3632 and 3633 and the requirements of 39 CFR part 3015. Comments are due no later than December 14, 2012. The public portions of this filing can be accessed via the Commission's Web site (*http://www.prc.gov*). Information on obtaining access to sealed material appears in 39 CFR part 3007.

IV. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. CP2013–24 for consideration of matters raised by the Postal Service's Notice.

2. Pursuant to 39 U.S.C. 505, James F. Callow is appointed to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

3. Comments are due no later than December 14, 2012.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2012–29779 Filed 12–10–12; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–30292; File No. 812–14059]

Mutual of America Life Insurance Company, *et al;* Notice of Application

December 5, 2012.

AGENCY: Securities and Exchange Commission (''SEC'' or ''Commission'').

ACTION: Notice of application for an order approving the substitution of certain securities pursuant to Section 26(c) of the Investment Company Act of 1940, as amended (the ''1940 Act'' or ''Act'') and an order of exemption pursuant to Section 17(b) of the Act from Section 17(a) of the Act.

APPLICANTS: Mutual of America Life Insurance Company (''Mutual of America''), Wilton Reassurance Life Company of New York (''Wilton,'' and, together with Mutual of America Life Insurance Company, the ''Insurance Companies''), Mutual of America Separate Account No. 2 (the ''Annuity Account''), Mutual of America Separate Account No. 3 (the ''Life Account''), American Separate Account No. 2 (the ''American Annuity Account''), and American Separate Account No. 3 (the ''American Life Account,'' and together with the Annuity Account, the Life Account, and the American Annuity Account, the ''Separate Accounts''). The Insurance Companies and the Separate Accounts are referred to herein collectively as the ''Substitution Applicants.'' The Insurance Companies, the Separate Accounts, and Mutual of America Investment Corporation (''Investment Corporation'') are also collectively referred to as the ''Section 17 Applicants.''

SUMMARY OF APPLICATION: The Substitution Applicants seek an order pursuant to Section 26(c) of the 1940 Act, approving the substitution of shares of: (a) the Vanguard International Portfolio (''Replacement International Fund'') of the Vanguard Variable Insurance Fund (''Vanguard Fund'') for Class A Shares of the DWS International VIP Fund (''Replaced International Fund'') of the DWS Variable Series I (''DWS Fund''), and (b) the Mutual of America Bond Fund (''Replacement Bond Fund'') of Investment Corporation for Class A Shares of the DWS Bond VIP Fund (''Replaced Bond Fund'') of the DWS Fund, under certain variable life insurance and annuity contracts issued by the Companies (collectively, the ''Contracts''). The Replacement International Fund and the Replacement Bond Fund are sometimes referred to collectively as ''Replacement Funds,'' and the Replaced International Fund and the Replaced Bond Fund are sometimes referred to collectively as ''Replaced Funds.'' The Section 17 Applicants seek an order pursuant to Section 17(b) of the 1940 Act exempting them from Section 17(a) of the Act to the extent necessary to permit them to engage in certain in-kind transactions in connection with the substitution.

FILING DATE: The application was filed on July 17, 2012, and the amended and restated application was filed on November 21, 2012.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Secretary of the Commission and serving the applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on December 28, 2012, and should be accompanied by proof of service on the applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the requester's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary of the Commission.

ADDRESSES: Secretary, SEC, 100 F Street NE., Washington, DC 20549–1090. Applicants: Mutual of America Life Insurance Company, Mutual of America Separate Account No. 2, Mutual of America Separate Account No. 3, Wilton Reassurance Life Company of New York, American Separate Account No. 2, American Separate Account No. 3, and Mutual of America Investment Corporation, all located at 320 Park Avenue, New York, New York 10022–68391.

FOR FURTHER INFORMATION CONTACT: Deborah D. Skeens, Senior Counsel, or Michael L. Kosoff, Branch Chief, Office of Insurance Products, Division of Investment Management, at (202) 551–6795.

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm,* or by calling (202) 551–8090.

Applicants' Representations

1. The Insurance Companies, on their own behalf and on behalf of their respective separate accounts, propose to substitute Class A shares of the Replacement Funds for shares of the Replaced Funds held by the Separate Accounts to fund the Contracts.

2. Mutual of America is the depositor and sponsor of the Annuity Account and the Life Account. Wilton is the depositor and sponsor of the American Annuity Account and the American Life Account.

3. Each of the Annuity Account, the Life Account, the American Annuity Account, and the American Life Account is a ''separate account'' as defined by Rule 0–1(e) under the Act and each is registered under the Act as a unit investment trust for the purpose of funding the Contracts. Security interests under the Contracts have been registered under the Securities Act of 1933. The application sets forth the registration statement file numbers for the Contracts and the Separate Accounts.

4. The DWS Fund and the Vanguard Fund are registered open-end management investment companies of the series type (File Number 002–96461

and 033–32216, respectively). Investment Corporation is a registered open-end management investment company of the series type (File Number 033–06486) which only sells its shares to the separate accounts of Mutual of America and Wilton that are used for their variable annuity and variable life insurance contracts, including the Replacement Bond Fund.

5. The substitution will replace an investment option (*i.e.,* the Replaced Bond Fund) managed by an entity that is not affiliated with the Substitution Applicants as of the date hereof (other than by way of certain of the Substitution Applicants owning more than 5% of the shares of the Replaced Funds) with an investment option (*i.e.,* the Replacement Bond Fund) that is managed by an investment manager that is affiliated with Mutual of America. Neither Investment Corporation nor Replacement Bond Fund's investment adviser, Mutual of America Capital Management Corporation (''Capital Management'') is affiliated with Wilton or its separate account. Both the Replaced International Fund and the Replacement International Fund are managed by entities that are not affiliated with the Substitution Applicants as of the date hereof (other than by way of certain of the Substitution Applicants owning more than 5% of the shares of the Replacement Funds).

6. The Contracts are flexible premium variable annuity and variable universal life insurance contracts. Under each of the Contracts (the proper form of which is provided to every Contract owner) as well as the prospectus for each Contract, the issuing Company reserves the right to substitute shares of one fund for shares of another fund managed by either the same investment adviser, or by a different investment adviser.

7. Applicants represent that the Replacement International Fund has an investment objective virtually identical to that of the Replaced International Fund—the Replacement Fund seeks long-term capital appreciation and the Replaced Fund seeks long-term growth of capital. Additionally, the Applicants state that the principal investment strategies of each Fund are substantially similar. Both Funds primarily invest in the common stock of foreign companies (*i.e.,* non-US domiciled companies) and are generally well diversified both with respect to geographic region and industry. Both may also invest in depositary receipts and convertible securities. Both Funds permit exposure to emerging markets and have historically allocated assets to this segment of the market. A comparison of the investing strategies, risks, and performance of the Replaced International Fund and the Replacement International Fund is included in the application. The following table compares the fees and expenses of the Replaced International Fund (Class A shares) and the Replacement International Fund (Class A shares) as of the year ended December 31, 2011 and the six months ended June 30, 2012. Neither the Replaced International Fund nor the Replacement International Fund is subject to a distribution plan or shareholder service plan adopted under Rule 12b–1 of the Act. Neither the Replaced International Fund nor the Replacement International Fund impose a redemption fee.

	Replaced International Fund		Replacement International Fund	
	DWS International VIP Fund		Vanguard International Fund	
	Year ended 12/31/11 (percent)	Six months ended 6/30/2012 (percent)	Year ended 12/31/11 (percent)	Six months ended 6/30/2012 (percent)
Advisory Fees	0.79	0.79	0.46	0.46
Distribution/Service (12b–1) Fee	0.00	0.00	0.00	0.00
Other Expenses	0.21	0.22	0.05	0.05
Total Annual Fund Operating Expenses	1.00	1.01	0.51	0.51
Less Contractual Fee Waivers and Expense Reimbursements	0.00	0.00	0.00	0.00
Net Annual Fund Operating Expenses	1.00	1.01	0.51	0.51
Portfolio Turnover Rate	174	51	33	26

8. The Applicants state that the Replacement Bond Fund has an investment objective similar to that of the Replaced Bond Fund. Both Funds have objectives that relate to current income as well as preservation of capital. While the Replaced Bond Fund also seeks to maximize total return, and invests for capital appreciation in addition to current income, its investment approach, security selection process and higher portfolio turnover rates have resulted in a more risky investment strategy than that of the Replacement Bond Fund (as further discussed below). Both Funds pursue their investment objectives by primarily investing, under normal market conditions, in publicly-traded, investment-grade debt securities. Each invests in investment grade bonds issued by US corporations or by the US Government or its agencies, such as bonds, notes, debentures, zero coupon securities and mortgage-backed securities. Further, the Replacement Bond Fund and the Replaced Bond Fund both utilize the same benchmark, the Barclay's Capital U.S. Aggregate Bond Index, to measure their relative investment performance. A comparison of the investing strategies, risks, and performance of the Replaced Bond Fund and the Replacement Bond Fund is included in the application. The following table compares the fees and expenses of the Replaced Bond Fund (Class A shares) and the Replacement Bond Fund (Class A shares) as of the year ended December 31, 2011 and the six months ended June 30, 2012. Neither the Replaced Bond Fund nor the Replacement Bond Fund is subject to a distribution plan or shareholder service plan adopted under Rule 12b–1 of the Act. Neither the Replaced Bond Fund nor the Replacement Bond Fund impose a redemption fee.

	Replaced Bond Fund		Replacement Bond Fund	
	DWS Bond Fund		Mutual of America Bond Fund	
	Year ended 12/31/11 (percent)	Six months ended 6/30/2012 (percent)	Year ended 12/31/11 (percent)	Six months ended 6/30/2012 (percent)
Advisory Fees	0.39	0.39	0.40	[1] 0.40
Distribution/Service (12b–1) Fee	0.00	0.00	0.00	0.00
Other Expenses	0.23	0.22	0.15	0.17
Total Annual Fund Operating Expenses	0.62	0.61	0.55	0.57
Less Contractual Fee Waivers and Expense Reimbursements	0.00	0.00	0.00	0.00
Net Annual Fund Operating Expenses	0.62	0.61	0.55	0.57
Portfolio Turnover	219	144	30	16.97

[1] Applicants represent that if an order of the Commission is granted pursuant to Section 26(c) of the Act approving the substitution described herein, then on or before the date of substitution, the investment adviser to the Replacement Bond Fund will amend its investment advisory contract to reduce its advisory fee by 0.01% to equal 0.39% of average daily net assets for all shareholders of the fund.

9. The Substitution Applicants state that the proposed substitution is part of the Companies' ongoing efforts to provide the Contracts with investment options that have: (1) A competitive fee structure relative to other funds in the same asset class peer group; (2) demonstrated the ability to achieve competitive long-term investment returns relative to other funds in the same asset class peer group; and (3) contributed to and enhanced the goal of offering an attractive array of investment options covering many various investment styles, objectives, and categories in the risk/return spectrum. The Substitution Applicants further state that substituting the Replacement Funds for the Replaced Funds will provide Contract owners with investment options that have not only virtually identical investment objectives and substantially similar principal investment strategies and principal investment risks to their respective Replaced Fund, but are, overall, less expensive relative to other funds in their respective asset classes, better positioned to achieve consistent long-term above-average investment performance, and have substantially greater potential for continued growth in assets under management. Substitution Applicants further state that following the substitution Contract owners will have reasonable continuity with respect to their investment expectations. For these reasons and the reasons discussed below, the Substitution Applicants believe that substituting the Replacement Funds for the Replaced Funds is appropriate and in the best interest of Contract owners.

10. As shown in more detail in the application, the total operating expense ratios for the Replacement International Fund and Replacement Bond Fund are lower than the net expense ratio for Class A shares of, respectively, the Replaced International Fund and the Replaced Bond Fund. Substitution Applicants also state that the Replacement International Fund outperformed the Replaced International Fund significantly and consistently for the one-, five-, and ten-year periods ended June 30, 2012. Similarly, Substitution Applicants state that the Replacement Bond Fund outperformed the Replaced Bond Fund significantly and consistently for the one-, five-, and ten-year periods ended June 30, 2012. Applicants assert that the Replacement Funds are appropriate replacements for the Replaced Funds for each Contract, and that each Replacement Fund represents an investment option that is appropriate and suitable given the investment objectives, principal investment strategies, and principal investment risks of the corresponding Replaced Fund and that offers the opportunity for lower fees and expenses and higher long-term investment returns in the future. Moreover, Applicants further assert that the replacement of the Replacement Funds with the Replaced Funds is consistent with the protection of Contract owners and the purposes fairly intended by the policy and provisions of the Act and, thus, meets the standards necessary to support an order pursuant to Section 26(c) of the Act.

11. By supplements to the Contract prospectuses, the Companies have notified existing Contract owners (and will notify new Contract owners who purchase a Contract subsequent to the date of the supplement but prior to the date of substitution) of their intention to take the necessary actions, including seeking the order requested by this Application, to carry out the proposed substitution as described herein. The supplements advised Contract owners that the Companies intended to file an application to seek approval of the substitution, and that if the substitution is approved, any Contract value allocated to a subaccount investing in a Replaced Fund on the date of substitution would be automatically transferred to the subaccount investing in the corresponding Replacement Fund. In addition, the supplements disclosed that any Contract owner not wanting his or her entire Contract value in the Replaced Fund(s) to be automatically transferred to the respective Replacement Fund on the date of substitution should consider transferring the Contract value in the Replaced Fund(s) to other investment options available under the Contract or, subject to the provisions of the Employer's Plan or the applicable Contract, to another provider prior to the date of substitution. The supplements also disclosed to Contract owners that the Companies do not impose charges in connection with the transfer among or withdrawal from any of the investment options available under the Contract, nor do they impose restrictions on transfers (other than frequent transfer restrictions). Finally, the supplements disclosed that the Companies would bear all expenses related to the substitution, and that there would be no tax consequences for Contract owners as a result of the substitution. Within five days following the date of substitution, Contract owners affected by the substitution will be notified in writing that the substitution was carried out. This notice will restate the information set forth in the prospectus supplements described above. The current prospectus for each Replacement Fund will have been provided to all Contract owners prior to the date of substitution and all Contract

owners will have been given sufficient advance notice of the date on which the substitution will take effect.

12. The proposed substitution will take place at relative net asset value with no change in the amount of any Contract owner's Contract value or death benefit or in the dollar value of his or her investment in any of the separate accounts.

13. It is anticipated that the proposed substitution will occur on or about March 22, 2013. The Companies' separate accounts may carry out the proposed substitution by redeeming some or all shares of the Replaced Funds in-kind on a pro-rata basis, such that each Replacement Fund will receive an approximate proportionate share of every security position in the corresponding Replaced Fund's portfolio in accordance with the conditions set forth in the Commission's no-action letter issued to *Signature Financial Group, Inc.* (available December 28, 1999) (''Signature Letter''). The adviser(s) to each Replacement Fund will review the proportionate share of securities holdings of the corresponding Replaced Fund to determine whether its portfolio holdings would be suitable investments for the Replacement Fund in the overall context of that Fund's investment objectives and policies and consistent with the management of that Fund. If a Replacement Fund declines to accept particular securities of the corresponding Replaced Fund for the purchase of in-kind of shares of the Replacement Fund, then the Replaced Fund will liquidate those portfolio securities and shares of the Replacement Funds will be purchased with cash equal in value to the liquidated portfolio securities. In either event, the proceeds of such redemptions will be used to purchase shares of the Replacement Funds. Redemption requests and purchase orders will be placed simultaneously so that Contract values will remain fully invested at all times. All redemptions of shares of the Replaced Funds and purchases of shares of the Replacement Funds will be effected in accordance with Section 22(c) of the Act and Rule 22c–1 thereunder.

14. Contract owners will not incur any fees or charges as a result of the substitution, nor will their rights or the Companies' obligations under the Contracts be altered in any way, and the substitution will not change Contract owners' insurance benefits under the Contracts. All applicable expenses incurred in connection with the substitution, including brokerage commissions and legal, accounting, and other fees and expenses, will be paid by the Companies. In addition, the substitution will not impose any tax liability on Contract owners. The substitution will not cause the Contract fees and charges currently being paid by existing Contract owners to be greater after the substitution than before the substitution. Because the Contracts do not limit the number of transfers permitted among investment options (other than certain limitations to deter frequent trading activity), and do not impose (or reserve the right to impose) any charges or fees for transfers or withdrawals, Contract owners will be able to transfer Contract value from the subaccounts investing in the Replaced Funds (before the date of substitution) or the Replacement Funds (after the date of substitution) to other investment options without restriction. Certain Contract owners may also transfer their Contract value, subject to the provisions of their Employer's Plan or the applicable Contract, to a new provider without charge.

15. With respect to the substitution involving the Replaced Bond Fund and the Replacement Bond Fund, for those who are Contract owners on the date of the proposed substitution, each Company will reimburse, on the last business day of each fiscal period (not to exceed a fiscal quarter) during the twenty-four months following the date of the proposed substitution, Contract owners investing in the Replacement Bond Fund to the extent that the sum of the Replacement Bond Fund's total annual fund operating expenses as expressed as a percentage of the average assets of the fund (after any applicable fee waiver and/or expense reimbursement) and subaccount expenses for such period exceed, on an annualized basis, the sum of the corresponding Replaced Bond Fund's total annual fund operating expenses (after any applicable fee waiver and/or expense reimbursement) and subaccount expenses for the fiscal year preceding the date of the proposed substitution. In addition, for twenty-four months following the proposed substitution, each Company will not increase Contract charges or asset-based fees of the subaccount investing in the Replacement Bond Fund for Contracts outstanding on the date of the proposed substitution.

16. With respect to the substitution involving the Replaced International Fund and the Replacement International Fund, the Applicants represent that they will not receive, for three years from the date of the substitution, any direct or indirect benefits paid by the Replacement International Fund, its advisors or underwriters (or their affiliates), in connection with assets attributable to Contracts affected by the substitution, at a higher rate than Applicants have received from the corresponding Replaced International Fund, its advisors or underwriters (or their affiliates), including without limitation Rule 12b–1 fees, shareholder service, administration, or other service fees, revenue sharing, or other arrangements in connection with such assets. Applicants represent that the substitution involving the Replaced International Portfolio and the Replacement International Portfolio and the selection of the Replacement International Fund were not motivated by any financial consideration paid or to be paid by the Replacement International Fund, its advisors, underwriters, or their respective affiliates.

17. Additionally, with respect to the Replacement Bond Fund, the Applicants represent that, if an order of the Commission is granted pursuant to Section 26(c) of the Act approving the substitution described herein, then on or before the date of substitution, Capital Management, the adviser to the Replacement Bond Fund, will amend its investment advisory contract to reduce its advisory fee by 0.01% to equal 0.39% of average daily net assets. In other words, on or before the date of substitution, the advisory fee for the Replacement Bond Fund will be equal to the advisory fee of the Replaced Bond Fund. Applicants further represent that, following this reduction, the advisory fee for the Replacement Bond Fund will not be increased without first obtaining shareholder approval.

18. The Companies are also seeking approval of the proposed substitution from any state insurance regulators whose approval may be necessary or appropriate.

Legal Analysis and Conditions

Section 26(c) Relief

1. The Substitution Applicants request that the Commission issue an order pursuant to Section 26(c) of the Act approving the proposed substitution. Section 26(c) of the Act requires the depositor of a registered unit investment trust holding the securities of a single issuer to obtain Commission approval before substituting the securities held by the trust.

2. Applicants assert that the proposed substitution is not the type of substitution that Section 26(c) was designed to prevent. Unlike traditional unit investment trusts where a depositor

could only substitute an investment security in a manner which permanently affected all the investors in the trust, the Contracts provide each Contract owner with the right to exercise his or her own judgment and transfer Contract values into other subaccounts and the fixed account. Moreover, the Contracts will offer Contract owners the opportunity to transfer amounts out of the affected subaccounts into any of the remaining subaccounts without cost or limitation. In addition, Contract owners always have the right to change their allocations at any time without restrictions or charges of any sort. The proposed substitution, therefore, will not result in the type of costly forced redemption that Section 26(c) was designed to prevent. In addition, Contract owners have the right to transfer their Contract value, subject to the provisions of their Employer's Plan or the applicable Contract, to a new provider and the Companies will not impose a fee or charge for such transfer.

3. The Substitution Applicants submit that the proposed substitution meets the standards set forth in Section 26(c) and that, if implemented, the substitution would not raise any of the concerns that Congress intended to address when the Act was amended to include this provision. In addition, the Applicants submit that the proposed substitution meets the standards that the Commission and its Staff have applied to substitutions that have been approved in the past.

Section 17(b) Relief

1. The Section 17 Applicants request an order under Section 17(b) of the Act exempting them from the provisions of Section 17(a) to the extent necessary to permit the Companies to carry out the proposed substitution as described herein.

2. Section 17(a)(1) of the Act, in relevant part, prohibits any affiliated person of a registered investment company, or any affiliated person of such person, acting as principal, from knowingly selling any security or other property to that company. Section 17(a)(2) of the Act generally prohibits the persons acting as principals, from knowingly purchasing any security or other property from the registered investment company.

3. Shares held by an insurance company separate account are legally owned by the insurance company. Thus, because Investment Corporation sells its shares exclusively to the Companies' separate accounts, the Companies collectively own all of the shares of Investment Corporation, and separately Mutual of America owns at least 25% of the shares of the Replacement Bond Fund. Accordingly, Investment Corporation and its portfolios, including the Replacement Bond Fund, are arguably under the control of the Companies, as per Section 2(a)(9) (notwithstanding the fact that the Contract Owners are the beneficial owners of those shares held in the separate accounts). If Investment Corporation is under the control of the Companies, then each Company is an affiliated person of Investment Corporation and its portfolios, including the Replacement Bond Fund. If Investment Corporation and its portfolios are under the control of the Companies, then Investment Corporation and its respective affiliates are affiliated persons of the Companies. Moreover, Mutual of America owns of record more than 5% of the shares of the Replacement Bond Fund, and therefore Mutual of America is an affiliated person of Investment Corporation and the Replacement Bond Fund. Likewise, Investment Corporation and the Replacement Bond Fund are each an affiliated person of Mutual of America. Further, Mutual of America indirectly controls Capital Management, its wholly-owned indirect subsidiary, and Capital Management is therefore controlled by Mutual of America. Furthermore, because Capital Management, as the investment adviser to Investment Corporation, is an affiliated person of Investment Corporation, Mutual of America and Investment Corporation (and its portfolios) is each an affiliated person of an affiliated person of the other. Finally, Mutual of America owns of record more than 5% of the shares of the Replacement International Fund. Therefore Mutual of America is an affiliated person of the Replacement International Fund and the Replacement International Fund is an affiliated person of Mutual of America. Because the proposed substitution may be effected, in whole or in part, by means of in-kind redemptions and subsequent purchases of shares, the proposed substitution may be deemed to involve one or more purchases or sales of securities or property between affiliated persons. The proposed substitution may involve a transfer of portfolio securities by the Replaced Funds to the Companies; immediately thereafter, the Companies would purchase shares of the Replacement Funds with the portfolio securities received from the Replaced Funds. Accordingly, as the Companies and the Replacement Funds could be viewed as affiliated persons of one another, it is conceivable that this aspect of the proposed substitution could be viewed as being prohibited by Section 17(a). The 17(a) Applicants have determined that it is prudent to seek relief from Section 17(a) in the context of this Application for the in-kind purchases and sales of the Replacement Funds' shares.

4. The 17(a) Applicants submit that the terms of the proposed in-kind purchases of shares of the Replacement Funds, including the consideration to be paid and received, as described in this Application, are reasonable and fair and do not involve overreaching on the part of any persons concerned. The 17(a) Applicants also submit that the proposed in-kind purchases will be consistent with the investment policies of the Vanguard Fund, the DWS Fund, and the Investment Corporation, and the Replaced and Replacement Funds, as recited in the current registration statements and reports filed by them under the Act. Finally, the 17(a) Applicants submit that the proposed substitution is consistent with the general purposes of the Act. The 17(a) Applicants assert that, to the extent that the in-kind purchases are deemed to involve principal transactions among affiliated persons, the procedures described below should be sufficient to assure that the terms of the proposed transactions are reasonable and fair to all Contract owners. The 17(a) Applicants maintain that the terms of the proposed in-kind purchase transactions, including the consideration to be paid and received by each fund involved, are reasonable, fair and do not involve overreaching on the part of any person principally because the transactions will conform with all but one of the conditions enumerated in Rule 17a–7. The proposed transactions will take place at relative net asset values as of the date of substitution in conformity with the requirements of Section 22(c) of the Act and Rule 22c–1 thereunder with no change in the amount of any Contract owner's Contract value or death benefit or in the dollar value of his or her investment in any of the separate accounts. Contract owners will not suffer any adverse tax consequences as a result of the substitution. The fees and charges under the Contracts will not increase because of the substitution. Even though the 17(a) Applicants may not rely on Rule 17a–7, the 17(a) Applicants believe that the Rule's conditions outline the type of safeguards that result in transactions that are fair and reasonable to registered investment company participants and preclude overreaching in connection

with an investment company by its affiliated persons.

5. The boards of the Replacement Funds have adopted procedures, as required by paragraph (e)(1) of Rule 17a–7, pursuant to which their series may purchase and sell securities to and from their affiliates. The 17(a) Applicants will carry out the proposed in-kind purchases in conformity with all of the conditions of Rule 17a–7 and the Replacement Funds' procedures adopted thereunder, except that the consideration paid for the securities being purchased or sold may not be entirely cash. The investment advisers of the Replacement Funds will examine any securities received from an in-kind redemption, and accept any securities that they would otherwise have purchased for cash for the respective portfolio to hold. The circumstances surrounding the proposed substitution will be such as to offer the Replacement Funds the same degree of protection from overreaching that Rule 17a–7 provides to them generally in connection with their purchase and sale of securities under that Rule in the ordinary course of their business. In particular, the proposed transactions will not be effected at a price that is disadvantageous to the Replacement Funds. Although the transactions may not be entirely for cash, each will be effected based upon (1) the independent market price of the portfolio securities valued as specified in paragraph (b) of Rule 17a–7, and (2) the net asset value per share of each Fund involved valued in accordance with the procedures disclosed in its registration statement and as required by Rule 22c–1 under the Act. Moreover, consistent with Rule 17a–7(d), no brokerage commissions, fees, or other cost or remuneration will be paid in connection with the proposed transactions, except for any brokerage commissions paid in connection with the liquidation of the securities that are not distributed as part of the in-kind redemption, which will be borne by the Companies and not by the Contract owners.

6. Applicants state that, consistent with Section 17(b) and Rule 17a–7(c), any in-kind redemptions and purchases for purposes of the proposed substitution will be transacted in a manner consistent with the investment objectives and policies of the Vanguard Fund, the DWS Fund, and the Investment Corporation, as recited in their registration statements. Any in-kind redemptions will be effected on a pro-rata basis, where each Replacement Fund will receive an approximate proportionate share of every security position in the corresponding Replaced Fund's portfolio in accordance with the Signature Letter. The adviser(s) to each Replacement Fund will review the proportionate share of securities holdings of the corresponding Replaced Fund to determine whether such holdings would be suitable investments for the Replacement Fund in the overall context of that Fund's investment objectives and policies and consistent with the management of that Fund. If the adviser declines to accept particular portfolio securities of the Replaced Fund for purchase in-kind of shares of the Replacement Fund, the Replaced Fund will liquidate those portfolio securities as necessary and shares of the Replacement Fund will be purchased with cash equal in value to the liquidated portfolio securities. In addition, the redeeming and purchasing values of such securities will be the same.

Conclusion

For the reasons and upon the facts set forth above and in the application, the Substitution Applicants and the Section 17 Applicants believe that the requested orders meet the standards set forth in Section 26(c) of the Act and Section 17(b) of the Act, respectively, and should therefore, be granted.

For the Commission, by the Division of Investment Management, under delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29858 Filed 12–10–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68354; File No. SR–NYSEMKT–2012–73]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule 472—Equities, Which Addresses Communications With the Public, Adopting New Rule Text To Conform to the Changes Adopted by the Financial Industry Regulatory Authority, Inc. for Research Analysts and Research Reports as Required by the Jumpstart Our Business Startups Act

December 4, 2012.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on November 27, 2012, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') filed with the Securities and Exchange Commission (the ''Commission'' or ''SEC'') the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 472—Equities, which addresses communications with the public, to adopt new rule text to conform to the changes adopted by the Financial Industry Regulatory Authority, Inc. (''FINRA'') for research analysts and research reports as required by the Jumpstart Our Business Startups Act (the ''JOBS Act'').[4] The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 472—Equities, which addresses communications with the public, to adopt new rule text to conform to the changes adopted by FINRA for research analysts and research reports as required by the JOBS Act.[5]

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] Public Law 112–106, 126 Stat. 306.

[5] *See* Securities Exchange Act Release No. 68037 (October 11, 2012), 77 FR 63908 (October 17, 2012) (SR–FINRA–2012–045). *See also* FINRA Regulatory Notice 12–49.

Background

On July 30, 2007, FINRA's predecessor, the National Association of Securities Dealers, Inc. (''NASD''), and NYSE Regulation, Inc. (''NYSER'') consolidated their member firm regulation operations into a combined organization, FINRA. Pursuant to Rule 17d-2 under the Securities Exchange Act of 1934, as amended (the ''Act''), New York Stock Exchange LLC (''NYSE''), NYSER and FINRA entered into an agreement (the ''Agreement'') to reduce regulatory duplication for their members by allocating to FINRA certain regulatory responsibilities for certain NYSE rules and rule interpretations (''FINRA Incorporated NYSE Rules''). NYSE MKT became a party to the Agreement effective December 15, 2008.[6]

As part of its effort to reduce regulatory duplication and relieve firms that are members of FINRA, NYSE and NYSE MKT of conflicting or unnecessary regulatory burdens, FINRA is now engaged in the process of reviewing and amending the NASD and FINRA Incorporated NYSE Rules in order to create a consolidated FINRA rulebook.[7]

Proposed Rule Change

The Exchange proposes to amend Rule 472—Equities to adopt new rule text to conform to the changes adopted by FINRA for research analysts and research reports in NASD Rule 2711 and FINRA Incorporated NYSE Rule 472. FINRA amended these rules primarily to conform to the requirements of the JOBS Act. The proposed changes to Rule 472—Equities are identical to the changes FINRA made to FINRA Incorporated NYSE Rule 472.[8]

The JOBS Act was signed into law on April 5, 2012. Among other things, the JOBS Act is intended to help facilitate capital formation for ''emerging growth companies'' (''EGCs'') by improving the information flow about EGCs to investors. To that end, Section 105(b) of the JOBS Act amended Section 15D of the Act to prohibit the Commission or any national securities association from adopting or maintaining any rule or regulation in connection with an initial public offering (''IPO'') of an EGC that:

- Restricts, based on functional role, which associated persons of a broker, dealer or member of a national securities association, may arrange for communications between an analyst and a potential investor; or
- Restricts a securities analyst from participating in any communication with the management of an EGC that is also attended by any other associated person of a broker, dealer, or member of a national securities association whose functional role is other than as a securities analyst.

Section 105(d) further prohibits the Commission or any national securities association from adopting or maintaining any rule or regulation that prohibits a broker or dealer from publishing or distributing any research report or making a public appearance, with respect to the securities of an EGC either:

- Within any prescribed period of time following the IPO date of the EGC; or
- Within any prescribed period of time prior to the expiration date of any agreement between the broker, dealer, or member of a national securities association and the EGC or its shareholders that restricts or prohibits the sale of securities held by the EGC or its shareholders after the IPO date.

These provisions became effective upon signature of the President of the United States on April 5, 2012. On August 22, 2012, the SEC's Division of Trading and Markets provided guidance on these provisions in the form of Frequently Asked Questions (''FAQs'').[9] The Exchange is amending Rule 472—Equities to conform with FINRA's amendments to the applicable provisions of NASD Rule 2711 and FINRA Incorporated NYSE Rule 472 to conform to the JOBS Act and the SEC staff's guidance with regard to the applicable JOBS Act provisions. The SEC staff guidance interprets the JOBS Act provisions as applicable to FINRA Incorporated NYSE Rule 472 to the same extent as NASD Rule 2711. As such, FINRA made corresponding amendments to Incorporated NYSE Rule 472. The proposed rule change corresponds identically to FINRA's amendments to FINRA Incorporated NYSE Rule 472.[10]

Arranging and Participating in Communications

Rule 472(b)(5)—Equities prohibits a research analyst from participating ''in efforts to solicit investment banking business,'' including any ''pitches'' for investment banking business or other communications with companies for the purpose of soliciting investment banking business. The FAQs interpret the JOBS Act to now allow, in connection with an IPO of an EGC, research analysts to attend meetings with issuer management that are also attended by investment banking personnel, including pitch meetings, but not ''engage in otherwise prohibited conduct in such meetings,'' including ''efforts to solicit investment banking business.'' The FAQs further explain that a research analyst that attends a pitch meeting ''could, for example, introduce themselves, outline their research program and the types of factors that the analyst would consider in his or her analysis of a company, and ask follow-up questions to better understand a factual statement made by the [EGC's] management.'' Accordingly, the proposed rule change creates an exception to Rule 472(b)(5)—Equities to reflect this guidance regarding the application of the JOBS Act.

The FAQs state that under Section 105(b) of the JOBS Act, an associated person of a broker-dealer, including investment banking personnel, may arrange communications between research analysts and investors in connection with an IPO of an EGC. As an example, the FAQs state that an investment banker could forward a list of clients to a research analyst that the analyst could, ''at his or her own discretion and with appropriate controls, contact.'' The FAQs acknowledge that no self-regulatory organization, including the Exchange, has a rule directly prohibiting this activity and further states that such activity, without more, would not constitute conduct by investment banking personnel to directly or indirectly direct a research analyst to engage in sales or marketing efforts related to an investment banking services transaction, in violation of Rule 472(b)(6)(ii)—Equities.[11] Accordingly,

[6] *See* Securities Exchange Act Release Nos. 56148 (July 26, 2007), 72 FR 42146 (August 1, 2007) (order approving the Agreement); 56147 (July 26, 2007), 72 FR 42166 (August 1, 2007) (SR–NASD–2007–054) (order approving the incorporation of certain NYSE Rules as ''Common Rules''); and 60409 (July 30, 2009), 74 FR 39353 (August 6, 2009) (order approving the amended and restated Agreement, adding NYSE MKT LLC as a party). Paragraph 2(b) of the Agreement sets forth procedures regarding proposed changes by FINRA, NYSE or NYSE MKT to the substance of any of the Common Rules.

[7] FINRA's rulebook currently has three sets of rules: (1) NASD Rules, (2) FINRA Incorporated NYSE Rules, and (3) consolidated FINRA Rules. The FINRA Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE (''Dual Members''), while the consolidated FINRA Rules apply to all FINRA members. For more information about the FINRA rulebook consolidation process, *see* FINRA Information Notice, March 12, 2008.

[8] NYSE Rule 472 is identical to Rule 472—Equities.

[9] These FAQs are available at *http://www.sec.gov/divisions/marketreg/tmjobsact-researchanalystsfaq.htm.*

[10] *See supra* note 5.

[11] *See supra* note 9. In 2003 and 2004, the Commission, self-regulatory organizations, and other regulators instituted settled enforcement actions against 12 broker-dealers to address conflicts of interest between the firms' research and

this JOBS Act provision requires no conforming rule change.

Quiet Periods

Section 105(d) of the JOBS Act expressly permits publication of research and public appearances with respect to the securities of an EGC any time after the IPO of an EGC or prior to the expiration of any lock-up agreement. While the JOBS Act refers only to the ''expiration'' of a lock-up agreement, the FAQs note the Commission staff's belief that Congress intended for the JOBS Act provisions to apply equally to the period before a ''waiver'' or ''termination'' of a lock-up agreement. Thus, in accordance with SEC staff guidance on this JOBS Act provision, the proposed rule change amends Rule 472—Equities to eliminate the following quiet periods with respect to an IPO of an EGC:

- Rule 472(f)(1)—Equities, which imposes a 40-day quiet period after an IPO on a member organization that acts as a manager or co-manager of such IPO;
- Rule 472(f)(3)—Equities, which imposes a 25-day quiet period after an IPO on a member organization that participates as an underwriter or dealer (other than manager or co-manager) of such an IPO; and
- Rule 472(f)(4)—Equities with respect to the 15-day quiet period applicable to IPO managers and co-managers prior to the expiration, waiver, or termination of a lock-up agreement or any other agreement that such member organization has entered into with a subject company or its shareholders that restricts or prohibits the sale of securities held by the subject company or its shareholders after the completion of an IPO.

The FAQs note that the JOBS Act makes no reference to quiet periods after a secondary offering or during a period of time after expiration, termination or waiver of a lock-up agreement. Accordingly, the FAQs note that Rule 472(f)(2)—Equities, which imposes a 10-day quiet period on managers and co-managers following a secondary offering and the remaining portion of Rule 472(f)(4)—Equities relating to quiet periods *after* the expiration, termination or waiver of a lock-up agreement, remain fully in effect. Nonetheless, the FAQs express the SEC staff's belief that the policies underlying the JOBS Act are equally applicable to quiet periods during these other times. The Exchange agrees that elimination of those quiet periods would advance the policy objectives of the JOBS Act and therefore has proposed to amend Rule 472(f)—Equities accordingly.

The Exchange also proposes to make a non-substantive change to correct the existing text of current Rule 472(f)(6)—Equities, which would become Rule 472(f)(7)—Equities as a result of the proposed changes described above.

2. Statutory Basis

The Exchange believes that the proposed change is consistent with Section 6(b) of the Act,[12] in general, and furthers the objectives of Section 6(b)(5) of the Act,[13] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system.

The proposed changes to Rules 472(b)(5), (f)(1), (f)(3) and (f)(4)—Equities (with respect to the 15-day quiet period before the expiration, termination or waiver of a lock-up agreement) conform those rules to statutory mandates. The proposed additional changes to Rules 472(f)(2) and (f)(4)—Equities further the policies underlying the statutory mandates by improving information flow to investors with respect to EGCs without sacrificing the reliability of research reports, as the other objectivity safeguards in Rule 472—Equities and SEC Regulation AC[14] are effective and will continue to apply. In addition, the Exchange believes that the proposed rule changes will remove impediments to and perfect the mechanisms of a free and open market and a national market system not only because it will conform Exchange rules to statutory mandates, but also because it will harmonize Exchange rules with identical FINRA rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[15] and Rule 19b–4(f)(6) thereunder.[16] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.[17]

A proposed rule change filed under Rule 19b–4(f)(6)[18] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[19] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission hereby grants the request.[20] Waiving the 30-day operative delay will allow the Exchange to conform its rules to statutory mandates and harmonize Exchange rules with identical FINRA rules. The Commission believes it is consistent with the protection of investors and the public interest to waive the 30-day operative delay and, therefore, designates the proposal as operative upon filing.

At any time within 60 days of the filing of such proposed rule change, the

investment banking functions (''Global Settlement''). As the guidance point out, firms subject to the Global Settlement should also be mindful of the requirements of that court order as they remain in place.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

[14] 17 CFR 242.500–05.

[15] 15 U.S.C. 78s(b)(3)(A)(iii).

[16] 17 CFR 240.19b–4(f)(6).

[17] In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of the filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[18] 17 CFR 240.19b–4(f)(6).

[19] 17 CFR 240.19b–4(f)(6)(iii).

[20] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEMKT–2012–73 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEMKT–2012–73. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Section, 100 F Street NE., Washington, DC 20549–1090. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at *www.nyse.com.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEMKT–2012–73 and should be submitted on or before January 2, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29853 Filed 12–10–12; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68358; File No. SR–NYSEMKT–2012–71]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Commentary .07 to Exchange Rule 904 To Increase the Position and Exercise Limits for Options on the iShares MSCI Emerging Markets Index Fund to 500,000 Contracts

December 5, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 26, 2012, NYSE MKT LLC (''NYSE MKT'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Commentary .07 to Exchange Rule 904 to increase the position and exercise limits for options on the iShares MSCI Emerging Markets Index Fund (''EEM'') to 500,000 contracts. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Commission approved the Exchange to list and trade the options on the iShares MSCI Emerging Markets Index Fund (''EEM'') on May 17, 2006.[3] Position limits for exchange-traded fund (''ETFs'') options, such as EEM options, are determined pursuant to Rule 904 and vary according to the number of outstanding shares and past six-month trading volume of the underlying stock or ETF. The largest in capitalization and most frequently traded stocks and ETFs have an option position limit of 250,000 contracts (with adjustments for splits, re-capitalizations, etc.) on the same side of the market; smaller capitalization stocks and ETFs have position limits of 200,000, 75,000, 50,000 or 25,000 contracts (with adjustments for splits, re-capitalizations, etc.) on the same side of the market. The current position limit for EEM options is 250,000 contracts. The purpose of the proposed rule change is to amend Exchange Rule 904, Commentary .07 to increase the position and exercise limits for EEM options to 500,000 contracts.[4]

Position limits serve as a regulatory tool designed to address potential manipulative schemes and adverse market impact surrounding the use of options. The Exchange understands that the Commission, when considering the appropriate level at which to set option position and exercise limits, has considered the concern that the limits be sufficient to prevent investors from disrupting the market in the security underlying the option.[5] This consideration has been balanced by the concern that the limits ''not be established at levels that are so low as to discourage participation in the options market by institutions and other

[21] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 53824 (May 17, 2006), 71 FR 30003 (May 24, 2006) (SR–Amex–2006–43).

[4] By virtue of Exchange Rule 905(a)(i), which is not being amended by this filing, the exercise limit for EEM options would be similarly increased.

[5] *See* Securities Exchange Act Release No. 40969 (January 22, 1999), 64 FR 4911, 4912–4913 (February 1, 1999) (SR–CBOE–98–23) (citing H.R. No. IFC–3, 96th Cong., 1st Sess. at 189–91 (Comm. Print 1978)).

investors with substantial hedging needs or to prevent specialists and market-makers from adequately meeting their obligations to maintain a fair and orderly market.'' [6]

There is precedent for establishing position limits for options on actively-traded ETFs and these position limit levels are set forth in Commentary .07 to Rule 904.

Option	Position limits
PowerShares QQQ Trust℠, Series 1 (QQQ).	900,000 contracts.
SPDR® S&P 500® ETF (SPY).	None.
iShares® Russell 2000® Index Fund (IWM).	500,000 contracts.
SPDR® Dow Jones Industrial Average℠ ETF Trust (DIA).	300,000 contracts.

In support of this proposed rule change, the Exchange has collected trading statistics comparing EEM to IWM and SPY. As shown in the following table, the average daily volume year to date in 2012 for EEM was 49.1 million shares compared to 47 million shares for IWM and 143.1 million shares for SPY. The total shares outstanding for EEM are 926.6 million compared to 204.2 million shares for IWM and 771.4 million shares for SPY. Further, the fund market cap for EEM is $38.2 billion compared to $16.7 billion for IWM and $108.9 billion for SPY.

ETF	October 2012 YTD ADV (mil. shares)	October 2012 YTD ADV (option contracts)	Shares outstanding (mil.) as of October 31, 2012	Fund market cap ($bil) as of October 31, 2012
EEM	49.1	249,496	926.6	38.2
IWM	47	498,723	204.2	16.7
SPY	143.1	2,292,977	771.4	108.9

In further support of this proposal, the Exchange represents that EEM still qualifies for the initial listing criteria set forth in Commentary .06 to Exchange Rules [sic] 915 for ETFs holding non-U.S. component securities.[7] EEM tracks the performance of the MSCI Emerging Markets Index, which has approximately 800 component securities.[8] ''The MSCI Emerging Markets Index is a free float-adjusted market capitalization index that is designed to measure equity market performance of emerging markets. The MSCI Emerging Markets Index consists of the following 21 emerging market country indices: Brazil, Chile, China, Colombia, Czech Republic, Egypt, Hungary, India, Indonesia, Korea, Malaysia, Mexico, Morocco, Peru, Philippines, Poland, Russia, South Africa, Taiwan, Thailand, and Turkey.'' [9] The Exchange represents that more than 50% of the weight of the securities held by EEM are now subject to a comprehensive surveillance agreement (''CSA'').[10] Additionally, the component securities of the MSCI Emerging Markets Index on which EEM is based for which the primary market is in any one country that is not subject to a CSA do not represent 20% or more of the weight of the MSCI Emerging Markets Index.[11] Finally, the component securities of the MSCI Emerging Markets Index on which EEM is based for which the primary market is in any two countries that are not subject to CSAs do not represent 33% or more of the weight of the MSCI Emerging Markets Index.[12]

The Exchange believes that the liquidity in the underlying ETF and the liquidity in EEM options support its request to increase the position and exercise limits for EEM options. As to the underlying ETF, through October 31, 2012 the year-to-date average daily trading volume for EEM across all exchanges was 49.1 million shares. As to EEM options, the year-to-date average daily trading for EEM options across all exchanges was 249,496 contracts.

The Exchange believes that the current position limits on EEM options may inhibit the ability of certain large market participants, such as mutual funds and other institutional investors with substantial hedging needs, to utilize EEM options and gain meaningful exposure to the hedging function they provide. The Exchange believes that increasing position limits for EEM options will lead to a more liquid and competitive market environment for EEM options that will benefit customers interested in this product.

Under the Exchange's proposal, the options reporting requirement for EEM options would continue unabated. Thus, the Exchange would still require that each ATP Holder that maintains a position in EEM options on the same side of the market, for its own account or for the account of a customer, report certain information to the Exchange. This information would include, but would not be limited to, the option position, whether such position is hedged and, if so, a description of the hedge, and the collateral used to carry the position, if applicable. In addition, the general reporting requirement for customer accounts that maintain an aggregate position of 200 or more option contracts would remain at this level for EEM options.[13]

As the anniversary of listed options trading approaches its fortieth year, the Exchange believes that the existing surveillance procedures and reporting requirements at the Exchange, other options exchanges, and at the several clearing firms are capable of properly identifying unusual and/or illegal trading activity. In addition, routine oversight inspections of the Exchange's regulatory programs by the Commission have not uncovered any material inconsistencies or shortcomings in the manner in which the Exchange's market surveillance is conducted. These procedures utilize daily monitoring of market movements via automated surveillance techniques to identify unusual activity in both options and underlying stocks.[14]

[6] *Id.,* at 4913.

[7] The Exchange notes that the initial listing criteria for options on ETFs that hold non-U.S. component securities are more stringent than the maintenance listing criteria for those same ETF options. *See* Exchange Rules 915, Commentary .06, and 916, Commentary .07.

[8] *See http://us.ishares.com/product_info/fund/overview/EEM.htm* and *http://www.msci.com/products/indices/licensing/msci_emerging_markets/.* Identification of the specific securities in the EEM and their individual concentrations in the EEM can be accessed at: *http://us.ishares.com/product_info/fund/holdings/EEM.htm.*

[9] *See http://www.msci.com/products/indices/tools/index.html#EM.*

[10] *See* Exchange Rules [sic] 915, Commentary .06 subsection (b)(i).

[11] *See* Exchange Rules [sic] 915, Commentary .06 subsection (b)(ii).

[12] *See* Exchange Rules [sic] 915, Commentary .06 subsection (b)(iii).

[13] For reporting requirements, *see* Exchange Rule 906.

[14] These procedures have been effective for the surveillance of EEM options trading and will continue to be employed.

Furthermore, large stock holdings must be disclosed to the Commission by way of Schedules 13D or 13G.[15] Options positions are part of any reportable positions and, thus, cannot be legally hidden. Moreover, the Exchange's requirement that members or member organizations file reports with the Exchange for any customer who held aggregate large long or short positions of any single class for the previous day will continue to serve as an important part of the Exchange's surveillance efforts.

The Exchange believes that the current financial requirements imposed by the Exchange and by the Commission adequately address concerns that an ATP Holder, or its customer may try to maintain an inordinately large un-hedged position in an option, particularly on EEM. Current margin and risk-based haircut methodologies serve to limit the size of positions maintained by any one account by increasing the margin and/or capital that an ATP Holder must maintain for a large position held by itself or by its customer.[16] In addition, the Commission's net capital rule, Rule 15c3–1 [17] under the Securities Exchange Act of 1934 (the ''Act''), imposes a capital charge on members to the extent of any margin deficiency resulting from the higher margin requirement.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) [18] of the Act, in general, and furthers the objectives of Section 6(b)(5),[19] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. Specifically, the proposed rule change will benefit large Market-Makers (which generally have the greatest potential and actual ability to provide liquidity and depth in the product), as well as retail traders, investors, and public customers, by providing them with a more effective trading and hedging vehicle. In addition, the Exchange believes that the structure of EEM options and the considerable liquidity of the market for EEM options diminish the opportunity to manipulate this product and disrupt the underlying market that a lower position limit may protect against.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [20] and Rule 19b–4(f)(6) thereunder.[21]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay so that it can increase the position and exercise limits for EEM options immediately, which will result in consistency and uniformity among the competing options exchanges as to the position limits for EEM options. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.[22] The Commission notes the proposal is substantively identical to a proposal that was recently approved by the Commission, and does not raise any new regulatory issues.[23] For these reasons, the Commission designates the proposed rule change as operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEMKT–2012–71 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEMKT–2012–71. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the

[15] 17 CFR 240.13d–1.

[16] *See* Exchange Rule 462 for a description of margin requirements.

[17] 17 CFR 240.15c3–1.

[18] 15 U.S.C. 78f(b).

[19] 15 U.S.C. 78f(b)(5).

[20] 15 U.S.C. 78s(b)(3)(A).

[21] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has fulfilled this requirement.

[22] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[23] *See* Securities Exchange Act Release No. 68086 (October 23, 2012), 77 FR 65600 (October 29, 2012) (SR–CBOE–2012–066).

public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEMKT–2012–71 and should be submitted on or before January 2, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29854 Filed 12–10–12; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68363; File No. S7–966]

Program for Allocation of Regulatory Responsibilities Pursuant to Rule 17d–2; Notice of Filing and Order Approving and Declaring Effective an Amendment to the Plan for the Allocation of Regulatory Responsibilities Among the BATS Exchange, Inc., BOX Options Exchange, LLC, the Chicago Board Options Exchange, Incorporated, C2 Options Exchange, Incorporated, the International Securities Exchange, LLC, Financial Industry Regulatory Authority, Inc., Miami International Securities Exchange, LLC, the New York Stock Exchange LLC, NYSE MKT LLC, NYSE Arca, Inc., The NASDAQ Stock Market LLC, NASDAQ OMX BX, Inc., and NASDAQ OMX PHLX, LLC. Concerning Options-Related Sales Practice Matters

December 5, 2012.

Notice is hereby given that the Securities and Exchange Commission (''Commission'') has issued an Order, pursuant to Section 17(d) of the Securities Exchange Act of 1934 (''Act''),[1] approving and declaring effective an amendment to the plan for allocating regulatory responsibility filed on November 20, 2012, pursuant to Rule 17d–2 of the Act,[2] by the BATS Exchange, Inc. (''BATS''), BOX Options Exchange, LLC (''BOX'') the Chicago Board Options Exchange, Incorporated (''CBOE''), C2 Options Exchange, Incorporated (''C2''), the International Securities Exchange, LLC (''ISE''), Financial Industry Regulatory Authority, Inc. (''FINRA''), Miami International Securities Exchange, LLC (''MIAX''), the New York Stock Exchange LLC (''NYSE''), NYSE MKT LLC (''NYSE MKT''), NYSE Arca, Inc. (''Arca''), The NASDAQ Stock Market LLC (''NASDAQ''), NASDAQ OMX BX, Inc. (''BX''), and NASDAQ OMX PHLX, Inc. (''Phlx'') (collectively, ''SRO participants'').

I. Introduction

Section 19(g)(1) of the Act,[3] among other things, requires every self-regulatory organization (''SRO'') registered as either a national securities exchange or national securities association to examine for, and enforce compliance by, its members and persons associated with its members with the Act, the rules and regulations thereunder, and the SRO's own rules, unless the SRO is relieved of this responsibility pursuant to Section 17(d)[4] or Section 19(g)(2)[5] of the Act. Without this relief, the statutory obligation of each individual SRO could result in a pattern of multiple examinations of broker-dealers that maintain memberships in more than one SRO (''common members''). Such regulatory duplication would add unnecessary expenses for common members and their SROs.

Section 17(d)(1) of the Act[6] was intended, in part, to eliminate unnecessary multiple examinations and regulatory duplication.[7] With respect to a common member, Section 17(d)(1) authorizes the Commission, by rule or order, to relieve an SRO of the responsibility to receive regulatory reports, to examine for and enforce compliance with applicable statutes, rules, and regulations, or to perform other specified regulatory functions.

To implement Section 17(d)(1), the Commission adopted two rules: Rule 17d–1 and Rule 17d–2 under the Act.[8] Rule 17d–1 authorizes the Commission to name a single SRO as the designated examining authority (''DEA'') to examine common members for compliance with the financial responsibility requirements imposed by the Act, or by Commission or SRO rules.[9] When an SRO has been named as a common member's DEA, all other SROs to which the common member belongs are relieved of the responsibility to examine the firm for compliance with the applicable financial responsibility rules. On its face, Rule 17d–1 deals only with an SRO's obligations to enforce member compliance with financial responsibility requirements. Rule 17d–1 does not relieve an SRO from its obligation to examine a common member for compliance with its own rules and provisions of the federal securities laws governing matters other than financial responsibility, including sales practices and trading activities and practices.

To address regulatory duplication in these and other areas, the Commission adopted Rule 17d–2 under the Act.[10] Rule 17d–2 permits SROs to propose joint plans for the allocation of regulatory responsibilities with respect to their common members. Under paragraph (c) of Rule 17d–2, the Commission may declare such a plan effective if, after providing for notice and comment, it determines that the plan is necessary or appropriate in the public interest and for the protection of investors, to foster cooperation and coordination among the SROs, to remove impediments to, and foster the development of, a national market system and a national clearance and settlement system, and is in conformity with the factors set forth in Section 17(d) of the Act. Commission approval of a plan filed pursuant to Rule 17d–2 relieves an SRO of those regulatory responsibilities allocated by the plan to another SRO.

II. The Plan

On September 8, 1983, the Commission approved the SRO participants' plan for allocating regulatory responsibilities pursuant to Rule 17d–2.[11] On May 23, 2000, the Commission approved an amendment to the plan that added the ISE as a participant.[12] On November 8, 2002, the

[24] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78q(d).

[2] 17 CFR 240.17d–2.

[3] 15 U.S.C. 78s(g)(1).

[4] 15 U.S.C. 78q(d).

[5] 15 U.S.C. 78s(g)(2).

[6] 15 U.S.C. 78q(d)(1).

[7] *See* Securities Act Amendments of 1975, Report of the Senate Committee on Banking, Housing, and Urban Affairs to Accompany S. 249, S. Rep. No. 94–75, 94th Cong., 1st Session 32 (1975).

[8] 17 CFR 240.17d–1 and 17 CFR 240.17d–2, respectively.

[9] *See* Securities Exchange Act Release No. 12352 (April 20, 1976), 41 FR 18808 (May 7, 1976).

[10] *See* Securities Exchange Act Release No. 12935 (October 28, 1976), 41 FR 49091 (November 8, 1976).

[11] *See* Securities Exchange Act Release No. 20158 (September 8, 1983), 48 FR 41256 (September 14, 1983).

[12] *See* Securities Exchange Act Release No. 42816 (May 23, 2000), 65 FR 34759 (May 31, 2000).

Commission approved another amendment that replaced the original plan in its entirety and, among other things, allocated regulatory responsibilities among all the participants in a more equitable manner.[13] On February 5, 2004, the parties submitted an amendment to the plan, primarily to include the Boston Stock Exchange, which was establishing a new options trading facility to be known as the Boston Options Exchange (''BOX''), as an SRO participant.[14] On December 5, 2007, the parties submitted an amendment to the plan to, among other things, provide that the National Association of Securities Dealers (''NASD'') (n/k/a the Financial Industry Regulatory Authority, Inc. or ''FINRA'') and NYSE are Designated Options Examining Authorities under the plan.[15] On June 5, 2008, the parties submitted an amendment to the plan primarily to remove the NYSE as a Designated Options Examining Authority, leaving FINRA as the sole Designated Options Examining Authority for all common members that are members of FINRA.[16] On February 9, 2010, the parties submitted a proposed amendment to the plan to add BATS and C2 as SRO participants and to reflect the name changes of the American Stock Exchange LLC to the NYSE Amex LLC, the Boston Stock Exchange, Inc., to the NASDAQ OMX BX, Inc. and the Philadelphia Stock Exchange, Inc. to the NASDAQ OMX PHLX, Inc. [17] On May 2, 2012, the parties submitted a proposed plan amendment to add BOX as an SRO participant, and to amend Section XIII of the plan to set forth a revised procedure for adding new participants to the plan.[18]

The plan reduces regulatory duplication for a large number of firms currently members of two or more of the SRO participants by allocating regulatory responsibility for certain options-related sales practice matters to one of the SRO participants. Generally, under the plan, the SRO participant responsible for conducting options-related sales practice examinations of a firm, and investigating options-related customer complaints and terminations for cause of associated persons of that firm, is known as the firm's ''Designated Options Examining Authority'' (''DOEA''). Pursuant to the plan, any other SRO of which the firm is a member is relieved of these responsibilities during the period in which the firm is assigned to another SRO acting as that firm's DOEA.

III. Proposed Amendment to the Plan

On November 20, 2012, the parties submitted a proposed amendment to the plan. The primary purpose of the amendment is to add MIAX as an SRO participant. The amendment also reflects the name change of the NYSE Amex LLC to NYSE MKT LLC. The text of the proposed amended 17d–2 plan is as follows (additions are *italicized;* deletions are [bracketed]):

* * * * *

Agreement by and among BATS Exchange, Inc., BOX Options Exchange, LLC, the Chicago Board Options Exchange, Incorporated, C2 Options Exchange, Incorporated, the International Securities Exchange, LLC, Financial Industry Regulatory Authority, Inc., [the] *Miami International Securities Exchange, LLC, the* New York Stock Exchange LLC, the NYSE [Amex] *MKT* LLC, the NYSE Arca, Inc., The NASDAQ Stock Market LLC, NASDAQ OMX BX, Inc. and the NASDAQ OMX PHLX LLC Pursuant to Rule 17d–2 under the Securities Exchange Act of 1934.

This agreement (''Agreement''), by and among BATS Exchange, Inc., BOX Options Exchange, LLC, the Chicago Board Options Exchange, Incorporated, C2 Options Exchange, Incorporated, the International Securities Exchange, LLC, Financial Industry Regulatory Authority, Inc. (''FINRA''), *Miami International Securities Exchange, LLC,* The NASDAQ Stock Market LLC (''NASDAQ''), NASDAQ OMX BX, Inc., the New York Stock Exchange LLC (''NYSE''), the NYSE [Amex] MKT LLC, the NYSE Arca, Inc., and the NASDAQ OMX PHLX LLC, hereinafter collectively referred to as the Participants, is made this [25th] *19th* day of [April] *November,* 2012, pursuant to the provisions of Rule 17d–2 under the Securities Exchange Act of 1934 (the ''Exchange Act''), which allows for plans among self-regulatory organizations to allocate regulatory responsibility. This Agreement shall be administered by a committee known as the Options Self-Regulatory Council (the ''Council'').

This Agreement amends and restates the agreement entered into among the Participants on [February 5, 2010] *April 25, 2012,* entitled ''Agreement by and among BATS Exchange, Inc., *BOX Options Exchange, LLC,* the Chicago Board Options Exchange, Incorporated, C2 Options Exchange, Incorporated, the International Securities Exchange, LLC, Financial Industry Regulatory Authority, Inc., the New York Stock Exchange LLC, NYSE Amex LLC, the NYSE Arca, Inc., the NASDAQ Stock Market LLC, NASDAQ OMX BX, Inc. and the NASDAQ OMX PHLX, Inc., Pursuant to Rule 17d–2 under the Securities Exchange Act of 1934.''

WHEREAS, the Participants are desirous of allocating regulatory responsibilities with respect to broker-dealers, and persons associated therewith, that are members [1] of more than one Participant (the ''Common Members'') and conduct a public business for compliance with Common Rules (as hereinafter defined) relating to the conduct by broker-dealers of accounts for listed options, index warrants, currency index warrants and currency warrants (collectively, ''Covered Securities''); and

WHEREAS, the Participants are desirous of executing a plan for this purpose pursuant to the provisions of Rule 17d–2 and filing such plan with the Securities and Exchange Commission (''SEC'' or the ''Commission'') for its approval;

NOW, THEREFORE, in consideration of the mutual covenants contained hereafter, the Participants agree as follows:

I. As used herein the term Designated Options Examining Authority (''DOEA'') shall mean: (1) FINRA insofar as it shall perform Regulatory Responsibility (as hereinafter defined) for its broker-dealer members that also are members of another Participant or (2) the Designated Examination Authority (''DEA'') pursuant to SEC Rule 17d–1 under the Securities Exchange Act (''Rule 17d–1'') for a broker-dealer that is a member of a more than one Participant (but not a member of FINRA).

II. As used herein, the term ''Regulatory Responsibility'' shall mean the examination and enforcement responsibilities relating to compliance by Common Members with the rules of the applicable Participant that are substantially similar to the rules of the other Participants (the ''Common Rules''), insofar as they apply to the conduct of accounts for Covered Securities. A list of the current Common Rules of each Participant applicable to the conduct of accounts for Covered Securities is attached hereto as Exhibit A. Each year within 30 days of the anniversary date of the commencement of operation of this Agreement, each Participant shall submit in writing to FINRA and each DEA

[13] *See* Securities Exchange Act Release No. 46800 (November 8, 2002), 67 FR 69774 (November 19, 2002).

[14] *See* Securities Exchange Act Release No. 49197 (February 5, 2004), 69 FR 7046 (February 12, 2004).

[15] *See* Securities Exchange Act Release No. 55532 (March 26, 2007), 72 FR 15729 (April 2, 2007).

[16] *See* Securities Exchange Act Release No. 57987 (June 18, 2008), 73 FR 36156 (June 25, 2008).

[17] *See* Securities Exchange Act Release No. 61589 (February 25, 2010), 75 FR 9976 (March 4, 2010).

[18] *See* Securities Exchange Act Release No. 66974 (May 11, 2012), 77 FR 29705 (May 18, 2012).

[1] In the case of BOX Options Exchange, LLC (''BOX''), NASDAQ OMX BX, Inc. (''BX'') and NASDAQ members are those persons who are options participants (as defined in the BOX, BX and NASDAQ Options Market Rules).

performing as a DOEA for any members of such Participant any revisions to Exhibit A reflecting changes in the rules of the Participant, and confirm that all other rules of the Participant listed in Exhibit A continue to meet the definition of Common Rules as defined in this Agreement. Within 30 days from the date that FINRA and each DEA performing as a DOEA has received revisions and/or confirmation that no change has been made to Exhibit A from all Participants, FINRA and each DEA performing as a DOEA shall confirm in writing to each Participant whether the rules listed in any updated Exhibit A are Common Rules as defined in this Agreement. Notwithstanding anything herein to the contrary, it is explicitly understood that the term ''Regulatory Responsibility'' does not include, and each of the Participants shall (unless allocated pursuant to Rule 17d–2 otherwise than under this Agreement) retain full responsibility for, each of the following:

(a) Surveillance and enforcement with respect to trading activities or practices involving its own marketplace, including without limitation its rules relating to the rights and obligations of specialists and other market makers;

(b) Registration pursuant to its applicable rules of associated persons;

(c) Discharge of its duties and obligations as a DEA; and

(d) Evaluation of advertising, responsibility for which shall remain with the Participant to which a Common Member submits same for approval.

III. Apparent violations of another Participant's rules discovered by a DOEA, but which rules are not within the scope of the discovering DOEA's Regulatory Responsibility, shall be referred to the relevant Participant for such action as the Participant to which such matter has been referred deems appropriate. Notwithstanding the foregoing, nothing contained herein shall preclude a DOEA in its discretion from requesting that another Participant conduct an enforcement proceeding on a matter for which the requesting DOEA has Regulatory Responsibility. If such other Participants agree, the Regulatory Responsibility in such case shall be deemed transferred to the accepting Participant and confirmed in writing by the Participants involved. Each Participant agrees, upon request, to make available promptly all relevant files, records and/or witnesses necessary to assist another Participant in an investigation or enforcement proceeding.

IV. The Council shall be composed of one representative designated by each of the Participants. Each Participant shall also designate one or more persons as its alternate representative(s). In the absence of the representative of a Participant, such alternate representative shall have the same powers, duties and responsibilities as the representative. Each Participant may, at any time, by notice to the then Chair of the Council, replace its representative and/or its alternate representative on such Council. A majority of the Council shall constitute a quorum and, unless specifically otherwise required, the affirmative vote of a majority of the Council members present (in person, by telephone or by written consent) shall be necessary to constitute action by the Council. The representative from FINRA shall serve as Chair of the Council. All notices and other communications for the Council shall be sent to it in care of the Chair or to each of the representatives.

V. The Council shall determine the times and locations of Council meetings, provided that the Chair, acting alone, may also call a meeting of the Council in the event the Chair determines that there is good cause to do so. To the extent reasonably possible, notice of any meeting shall be given at least ten-business days prior thereto. Notwithstanding anything herein to the contrary, representatives shall always be given the option of participating in any meeting telephonically at their own expense rather than in person.

VI. FINRA shall have Regulatory Responsibility for all Common Members that are members of FINRA. For the purpose of fulfilling the Participants' Regulatory Responsibilities for Common Members that are not members of FINRA, the Participant that is the DEA shall serve as the DOEA. All Participants shall promptly notify the DOEAs no later than the next scheduled meeting of any change in membership of Common Members. A DOEA may request that a Common Member that is allocated to it be reallocated to another DOEA by giving thirty days written notice thereof. The DOEAs in their discretion may approve such request and reallocate such Common Member to another DOEA.

VII. Each DOEA shall conduct an examination of each Common Member. The Participants agree that, upon request, relevant information in their respective files relative to a Common Member will be made available to the applicable DOEA. At each meeting of the Council, each DOEA shall be prepared to report on the status of its examination program for the previous quarter and any period prior thereto that has not previously been reported to the Council.

VIII. Each DOEA will promptly furnish a copy of the Examination report, relating to Covered Securities, of any examination made pursuant to the provisions of this Agreement to each other Participant of which the Common Member examined is a member.

IX. Each DOEA's Regulatory Responsibility shall for each Common Member allocated to it include investigations into terminations ''for cause'' of associated persons relating to Covered Securities, unless such termination is related solely to another Participant's market. In the latter instance, that Participant to whose market the termination for cause relates shall discharge Regulatory Responsibility with respect to such termination for cause. In connection with a DOEA's examination, investigation and/or enforcement proceeding regarding a Covered Security-related termination for cause, the other Participants of which the Common Member is a member shall furnish, upon request, copies of all pertinent materials related thereto in their possession. As used in this Section, ''for cause'' shall include, without limitation, terminations characterized on Form U5 under the label ''Permitted to Resign,'' ''Discharge'' or ''Other.''

X. Each DOEA shall discharge the Regulatory Responsibility for each Common Member allocated to it relative to a Covered Securities-related customer complaint [2] unless such complaint is uniquely related to another Participant's market. In the latter instance, the DOEA shall forward the matter to that Participant to whose market the matter relates, and the latter shall discharge Regulatory Responsibility with respect thereto. If a Participant receives a customer complaint for a Common Member related to a Covered Security for which the Participant is not the DOEA, the Participant shall promptly forward a copy of such complaint to the DOEA.

XI. Any written notice required or permitted to be given under this Agreement shall be deemed given if sent by certified mail, return receipt requested, or by a comparable means of electronic communication to each Participant entitled to receipt thereof, to the attention of the Participant's representative on the Council at the Participant's then principal office or by email at such address as the representative shall have filed in writing with the Chair.

XII. The Participants shall notify the Common Members of this Agreement by means of a uniform joint notice approved by the Council.

XIII. This Agreement may be amended to add a new Participant provided that such Participant does not assume Regulatory Responsibility, solely by an amendment by FINRA and such new Participant. All other Participants expressly consent to allow FINRA to add new Participants to this Agreement as provided above. FINRA will promptly notify all Participants of any such amendments to add new Participants. All other amendments to this Agreement must be approved in writing by each Participant. All amendments, including adding a new Participant, must be filed with and approved by the SEC before they become effective.

XIV. Any of the Participants may manifest its intention to cancel its participation in this Agreement at any time by giving the Council written notice thereof at least 90 days prior to the effective date of such cancellation. Upon receipt of such notice the Council shall allocate, in accordance with the provisions of this Agreement, any Common Members for which the petitioning party was the DOEA. Until such time as the Council has completed the reallocation described above; the petitioning Participant shall retain all its rights, privileges, duties and obligations hereunder.

XV. The cancellation of its participation in this Agreement by any Participant shall not terminate this Agreement as to the remaining Participants. This Agreement will only terminate following notice to the Commission, in writing, by the then Participants that they intend to terminate the Agreement and the expiration of the applicable notice period. Such notice shall be given at least six months prior to the intended date of termination, provided that in the event a notice of cancellation is

[2] For purposes of complaints, they can be reported pursuant to Form U4, Form U5 or RE–3 and any amendments thereto.

received from a Participant that, assuming the effectiveness thereof, would result in there being just one remaining member of the Council, notice to the Commission of termination of this Agreement shall be given promptly upon the receipt of such notice of cancellation, which termination shall be effective upon the effectiveness of the cancellation that triggered the notice of termination to the Commission.

XVI. No Participant nor the Council nor any of their respective directors, governors, officers, employees or representatives shall be liable to any other Participant in this Agreement for any liability, loss or damage resulting from or claimed to have resulted from any delays, inaccuracies, errors or omissions with respect to the provision of Regulatory Responsibility as provided hereby or for the failure to provide any such Responsibility, except with respect to such liability, loss or damages as shall have been suffered by one or more of the Participants and caused by the willful misconduct of one or more of the other participants or their respective directors, governors, officers, employees or representatives. No warranties, express or implied, are made by any or all of the Participants or the Council with respect to any Regulatory Responsibility to be performed by each of them hereunder.

XVII. Pursuant to Section 17(d)(1)(A) of the Securities Exchange Act of 1934 and Rule 17d–2 promulgated pursuant thereto, the Participants join in requesting the Securities and Exchange Commission, upon its approval of this Agreement or any part thereof, to relieve those Participants which are from time to time participants in this Agreement which are not the DOEA as to a Common Member of any and all Regulatory Responsibility with respect to the matters allocated to the DOEA.

REVISED *November 19, 2012*

EXHIBIT A

RULES ENFORCED UNDER 17d–2 AGREEMENT

Pursuant to Section II of the Agreement by and among BATS Exchange, Inc. (''BATS''), BOX Options Exchange, LLC (''BOX''), the Chicago Board Options Exchange, Incorporated (''CBOE''), C2 Options Exchange, Incorporated (''C2''), the International Securities Exchange, LLC (''ISE''), Financial Industry Regulatory Authority, Inc. (''FINRA''), *Miami International Securities Exchange, LLC (''MIAX''),* The NASDAQ Stock Market LLC (''NASDAQ''), NASDAQ OMX BX, Inc. (''BX''), the New York Stock Exchange LLC (''NYSE''), the NYSE [Amex] *MKT* LLC (''NYSE [Amex] *MKT*''), the NYSE Arca, Inc. (''NYSE ARCA''), and the NASDAQ OMX PHLX LLC (''PHLX'') pursuant to Rule 17d–2 under the Securities Exchange Act of 1934 dated *November 19,* 2012 (the ''Agreement''), a revised list of the current Common Rules of each Participant, as compared to those of FINRA, applicable to the conduct of accounts for Covered Securities is set forth in this Exhibit A.

Opening of Accounts

NYSE [Amex] *MKT*.	Rules 411, 921 and 1101
BATS	Rule 26.2
BOX	Rule 4020 [1]
CBOE	Rule 9.7
C2*	CBOE Rule 9.7
ISE	Rule 608
FINRA	Rules 2360(b)(16) and 2352
NYSE	Rule 721 [2]
MIAX	*Rule 1307*
PHLX	Rule 1024(b) and (c) [3]
NYSE ARCA	Options Rules 9.2(a) and 9.18(b) and Equities Rule 8.4
BX	Chapter XI, Section 9
NASDAQ	Chapter XI, Section 7

Supervision

NYSE [Amex] *MKT*.	Rules 411, 922 and 1104
BATS	Rule 26.3
BOX	Rule 4030
CBOE	Rule 9.8
C2	CBOE Rule 9.8
ISE	Rule 609
FINRA	Rules 2360(b)(20), 2360(b)(17)(B), 2360(b)(16)(E), 2355 and 2358
MIAX	*Rule 1308*
NYSE	N/A
PHLX	Rule 1025
NYSE ARCA	Options Rules 9.2(b) and 9.18(d)(2)(G) and Equities Rule 8.7
BX	Chapter XI, Section 10
NASDAQ	Chapter XI, Section 8

Suitability

NYSE [Amex] *MKT*.	Rules 923 and 1102
BATS	Rule 26.4
BOX	Rule 4040
CBOE	Rule 9.9
C2	CBOE Rule 9.9
ISE	Rule 610
FINRA	Rule 2360(b)(19) and 2353
MIAX	*Rule 1309*
NYSE	Rule 723
PHLX	Rule 1026
NYSE ARCA	Options Rule 9.18(c) and Equities Rule 8.5
BX	Chapter XI, Section 11
NASDAQ	Chapter XI, Section 9

Discretionary Accounts

NYSE *MKT* [Amex].	Rules 421, 924 and 1103
BATS	Rule 26.5 [4]
BOX	Rule 4050 [4]
CBOE	Rule 9.10
C2	CBOE Rule 9.10
ISE	Rule 611
FINRA	Rules 2360(b)(18) and 2354
MIAX	*Rule 1310*
NYSE	N/A
PHLX	Rule 1027
NYSE ARCA	Options Rule 9.18(e) and Equities Rule 8.6
BX	Chapter XI, Section 12
NASDAQ	Chapter XI, Section 10

Customer Communications (Advertising)

NYSE *MKT* [Amex].	Rules 991 and 1106
BATS	Rule 26.16
BOX	Rule 4170
CBOE	Rule 9.21 [5]
C2	CBOE Rule 9.21 [5]
ISE	Rule 623 [6]
FINRA	Rules 2220 and 2357
MIAX	*Rule 1322*
NYSE	N/A
PHLX	N/A
NYSE ARCA	Options Rules 9.21(a) and 9.21(b)
BX	Chapter XI, Section 24
NASDAQ	Chapter XI, Section 22

Customer Complaints

NYSE *MKT* [Amex].	Rules 932 and 1105
BATS	Rule 26.17
BOX	Rule 4190
CBOE	Rule 9.23
C2	CBOE Rule 9.23
ISE	Rule 625
FINRA	FINRA Rules 2360(b)(17)(A) and 2356
MIAX	*Rule 1324*
NYSE	Rules 732
PHLX	Rule 1070
NYSE ARCA	Options Rule 9.18(l) and Equities Rule 8.8
BX	Chapter XI, Section 26
NASDAQ	Chapter XI, Section 24

Customer Statements

NYSE *MKT* [Amex].	Rules 419 and 930
BATS	Rule 26.7
BOX	Rule 4070
CBOE	Rule 9.12
C2	CBOE Rule 9.12
ISE	Rules 613
FINRA	Rule 2360(b)(15)
MIAX	*Rule 1312*
NYSE	Rules 730
PHLX	Rule 1032
NYSE ARCA	Options Rule 9.18(j)
BX	Chapter XI, Sections 14
NASDAQ	Chapter XI, Section 12

Confirmations

NYSE *MKT* [Amex].	Rule 925
BATS	Rule 26.6
BOX	Rule 4060 [7]
CBOE	Rule 9.11
C2	CBOE Rule 9.11
ISE	Rule 612
FINRA	Rule 2360(b)(12)
MIAX	*Rule 1311*
NYSE	Rules 725[8]
PHLX	Rule 1028
NYSE ARCA	Options Rule 9.18(f)
BX	Chapter XI, Section 13
NASDAQ	Chapter XI, Section 11

Allocation of Exercise Assignment Notices	
NYSE *MKT* [Amex].	Rule 981
BATS	Rule 23.2
BOX	Rule 9010
CBOE	Rule 11.2
C2	CBOE Rule 11.2
ISE	Rule1101
FINRA	Rule 2360(b)(23)(C)
MIAX	*Rule 701*
NYSE	Rule 781
PHLX	Rule 1043
NYSE ARCA	Options Rule 6.25(a)
BX	Chapter VII, Section 2
NASDAQ	Chapter VIII, Section 2

Disclosure Documents	
NYSE *MKT* [Amex].	Rules 921 and 926
BATS	Rule 26.10
BOX	Rule 4100
CBOE	Rule 9.15
C2	CBOE Rule 9.15
ISE	Rule 616
FINRA	Rule 2360(b)(11)
MIAX	*Rule 1315*
NYSE	Rule 726 (a) and (c)
PHLX	Rule 1024(b)(v), 1029
NYSE ARCA	Options Rule 9.18(g)
BX	Chapter XI, Section 17
NASDAQ	Chapter XI, Section 15

Branch Offices of Member Organizations	
NYSE *MKT* [Amex].	Rule 922(d)[9]
BOX	Rule 4010(b)
CBOE	Rule 9.6
C2	CBOE Rule 9.6
ISE	Rule 607
FINRA	Rules 2360(b)(20)(B) and 2355
MIAX	*1306*
NYSE	N/A
PHLX	N/A
NYSE ARCA	Options Rule 9.18(m)
BX	Chapter XI, Section 8
NASDAQ	Chapter XI, Section 6

Prohibition Against Guarantees	
NYSE *MKT* [Amex].	Rule 390
BATS	Rule 26.13
BOX	Rule 4130
CBOE	Rule 9.18
C2	CBOE Rule 9.18
ISE	Rules 619
FINRA	Rule 2150(b)
MIAX	*Rule 1318*
NYSE	Rule 2150(b)
PHLX	Rule 777
NYSE ARCA	Options Rule 9.1(e)
BX	Chapter XI, Sections 20 and 21
NASDAQ	Chapter XI, Sections 18 and 19

Sharing in Accounts	
NYSE *MKT* [Amex].	Rule 390
BATS	Rule 26.14
BOX	Rule 4140
CBOE	Rule 9.18(b)
C2	CBOE Rule 9.18(b)
ISE	Rule 620[10]
FINRA	Rule 2150(c)
MIAX	*Rule 1319*
NYSE	Rules 2150(c)
PHLX	N/A
NYSE ARCA	Options Rule 9.1(f)
BX	Chapter XI, Section 21
NASDAQ	Chapter XI, Section 19[11]

Registration of Rop	
NYSE *MKT* [Amex].	Rule 920
BATS	17.2(g)(1), (2), (6) and (7)
BOX	Rule 2020(c)(1), (e)(1) and IM–2040–4 and IM–2040–5(b)
CBOE	Rule 9.2
C2	CBOE Rule 9.2
ISE	Rule 601
FINRA	NASD Rules 1022(f) & IM–1022–1
MIAX	*Rule 1301*
NYSE	N/A
PHLX	Rule 1024(a)(i)
NYSE ARCA	Options Rule 9.26
BX	Chapter XI, Section 2
NASDAQ	Chapter XI, Section 2

Certification of Registered Personnel	
NYSE *MKT* [Amex].	Rule 920
BATS	Rule 2.5 Interpretation .01(c) and 11.4(e)
BOX	IM–2040–3
CBOE	Rule 9.3
C2	CBOE Rule 9.3
ISE	Rule 602
FINRA	NASD Rule 1032(d)
MIAX	*Rule 1302*
NYSE	N/A
PHLX	Rule 1024
NYSE ARCA	Options Rule 9.27(a)
BX	Chapter XI, Section 3
NASDAQ	Chapter XI, Section 3

* Pursuant to C2 Chapters 9 and 11, the rules contained in CBOE Chapters IX and XI and referenced herein shall apply to C2.

[1] FINRA shall not have any Regulatory Responsibility regarding the requirement for designation of Senior Options Principal and Compliance Options Principal.

[2] FINRA shall not have any Regulatory Responsibility regarding opening short uncovered option accounts requirements.

[3] FINRA shall not have any Regulatory Responsibility regarding foreign currency option requirements specified in any of the PHLX rules in this Exhibit A.

[4] FINRA shall not have any Regulatory Responsibility to enforce this rule as to time and price discretion in institutional accounts. In addition FINRA shall not have any Regulatory Responsibility regarding BOX Rule 4050(a)(2).

[5] FINRA shall not have any Regulatory Responsibility regarding CBOE's and C2's requirements to the extent that a customer would meet FINRA's definition of Institutional Investor and Institutional Sales Material but would not meet the requirements for such definitions in under CBOE's and C2's rule.

[6] FINRA shall not have any Regulatory Responsibility regarding ISE's requirements to the extent that a customer would meet FINRA's definition of Institutional Investor and Institutional Sales Material but would not meet the requirements for such definitions in under such rule. In addition, FINRA shall not have any Regulatory Responsibility regarding ISE's requirements regarding approval of all market letters.

[7] FINRA shall not have any Regulatory Responsibility regarding the requirement in confirmations to distinguish between BOX option transactions and other transactions in option contracts.

[8] FINRA shall not have any Regulatory Responsibility regarding the requirement in confirmations to distinguish between NYSE option transactions and other transactions in option contracts.

[9] FINRA shall only have Regulatory Responsibility for the first paragraph and shall not have any Regulatory Responsibility regarding the requirements for debt options.

[10] FINRA shall not have any Regulatory Responsibility regarding ISE's requirements to the extent its rule does not contain an exception to permit sharing in the profits and losses of an account.

[11] FINRA shall not have any Regulatory Responsibility regarding NASDAQ's requirements to the extent such rules do not contain an exception addressing immediate family.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/other.shtml);* or
- Send an email to *rule-comments@sec.gov.* Please include File Number S7–966 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–966. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/other.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed plan that are filed with the Commission, and all written communications relating to the proposed plan between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web

site viewing and printing in the Commission's Public Reference Room, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the plan also will be available for inspection and copying at the principal offices of BATS, BOX, CBOE, C2, ISE, FINRA, MIAX, NYSE, NYSE MKT, Arca, NASDAQ, BX and the Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number S7–966 and should be submitted on or before January 2, 2013.

V. Discussion

The Commission continues to believe that the proposed plan is an achievement in cooperation among the SRO participants. The Plan, as amended, will reduce unnecessary regulatory duplication by allocating to the designated SRO the responsibility for certain options-related sales practice matters that would otherwise be performed by multiple SROs. The plan promotes efficiency by reducing costs to firms that are members of more than one of the SRO participants. In addition, because the SRO participants coordinate their regulatory functions in accordance with the plan, the plan promotes, and will continue to promote, investor protection.

Under paragraph (c) of Rule 17d–2, the Commission may, after appropriate notice and comment, declare a plan, or any part of a plan, effective. In this instance, the Commission believes that appropriate notice and comment can take place after the proposed amendment is effective. The primary purpose of the amendment is to add MIAX as an SRO participant. By declaring it effective today, the amended Plan can become effective and be implemented without undue delay.[19] The Commission notes that the prior version of this plan immediately prior to this proposed amendment was published for comment and the Commission did not receive any comments thereon.[20] Furthermore, the Commission does not believe that the amendment to the plan raises any new regulatory issues that the Commission has not previously considered.

VI. Conclusion

This order gives effect to the amended plan submitted to the Commission that is contained in File No. S7–966.

It is therefore ordered, pursuant to Section 17(d) of the Act,[21] that the amended plan dated November 19, 2012, by and between the BATS, BOX, CBOE, C2, ISE, FINRA, MIAX, NYSE, NYSE MKT, Arca, NASDAQ, BX and the Phlx filed pursuant to Rule 17d–2 on November 20, 2012 is hereby approved and declared effective.

It is further ordered that those SRO participants that are not the DOEA as to a particular common member are relieved of those regulatory responsibilities allocated to the common member's DOEA under the amended plan to the extent of such allocation.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29843 Filed 12–10–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68279A; File No. SR–NASDAQ–2012–117]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Designation of Longer Period for Commission Action on Proposed Rule Change With Respect to INAV Pegged Orders for ETFs; Correction

December 4, 2012.

AGENCY: Securities and Exchange Commission.

ACTION: Notice; correction.

SUMMARY: The Securities and Exchange Commission published a document in the **Federal Register** on November 27, 2012, concerning a Notice of Designation of Longer Period for Commission Action on Proposed Rule Change with Respect to INAV Pegged Orders for ETFs. The document contained typographical errors.

FOR FURTHER INFORMATION CONTACT: Sarah E. Schandler, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549, (202) 551–7145.

Correction

In the **Federal Register** of November 27, 2012 in FR Doc. 2012–70857, on page 70858, in the eighteenth line in the first column, correct the reference to January 16, 2012 instead to January 16, 2013, and in footnote 7 in the first column, correct the reference to 17 CFR 200.30–3(a)(57) instead to 17 CFR 200.30–3(a)(31).

Dated: December 4, 2012.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29857 Filed 12–10–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68359; File No. SR–NYSEArca–2012–132]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Commentary .06 to Exchange Rule 6.8 To Increase the Position and Exercise Limits for Options on the iShares MSCI Emerging Markets Index Fund to 500,000 Contracts

December 5, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 26, 2012, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Commentary .06 to Exchange Rule 6.8 to increase the position and exercise limits for options on the iShares MSCI Emerging Markets Index Fund (''EEM'') to 500,000 contracts. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of,

[19] On December 3, 2012, the Commission granted MIAX's application for registration as a national securities exchange. *See* Securities Exchange Act Release No. 68341 (File No. 10–207).

[20] *See supra* note 18 (citing to Securities Exchange Act Release No. 66974).

[21] 15 U.S.C. 78q(d).

[22] 17 CFR 200.30–3(a)(34).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Position limits for exchange-traded fund (''ETFs'') options, such as EEM options, are determined pursuant to Rule 6.8 and vary according to the number of outstanding shares and past six-month trading volume of the underlying stock or ETF. The largest in capitalization and most frequently traded stocks and ETFs have an option position limit of 250,000 contracts (with adjustments for splits, re-capitalizations, etc.) on the same side of the market; smaller capitalization stocks and ETFs have position limits of 200,000, 75,000, 50,000 or 25,000 contracts (with adjustments for splits, re-capitalizations, etc.) on the same side of the market. The current position limit for EEM options is 250,000 contracts. The purpose of the proposed rule change is to amend Exchange Rule 6.8, Commentary .06 to increase the position and exercise limits for EEM options to 500,000 contracts.[3]

Position limits serve as a regulatory tool designed to address potential manipulative schemes and adverse market impact surrounding the use of options. The Exchange understands that the Commission, when considering the appropriate level at which to set option position and exercise limits, has considered the concern that the limits be sufficient to prevent investors from disrupting the market in the security underlying the option.[4] This consideration has been balanced by the concern that the limits ''not be established at levels that are so low as to discourage participation in the options market by institutions and other investors with substantial hedging needs or to prevent specialists and market-makers from adequately meeting their obligations to maintain a fair and orderly market.''[5]

There is precedent for establishing position limits for options on actively-traded ETFs and these position limit levels are set forth in Commentary .06 to Rule 6.8.

Option	Position limits
PowerShares QQQ Trust℠, Series 1 (QQQ).	900,000 contracts.
SPDR® S&P 500® ETF (SPY).	None.
iShares® Russell 2000® Index Fund (IWM).	500,000 contracts.
SPDR® Dow Jones Industrial Average℠ ETF Trust (DIA).	300,000 contracts.

In support of this proposed rule change, the Exchange has collected trading statistics comparing EEM to IWM and SPY. As shown in the following table, the average daily volume year to date in 2012 for EEM was 49.1 million shares compared to 47 million shares for IWM and 143.1 million shares for SPY. The total shares outstanding for EEM are 926.6 million compared to 204.2 million shares for IWM and 771.4 million shares for SPY. Further, the fund market cap for EEM is $38.2 billion compared to $16.7 billion for IWM and $108.9 billion for SPY.

ETF	October 2012 YTD ADV (mil. shares)	October 2012 YTD ADV (option contracts)	Shares outstanding (mil.) as of October 31, 2012	Fund market cap ($bil) as of October 31, 2012
EEM	49.1	249,496	926.6	38.2
IWM	47	498,723	204.2	16.7
SPY	143.1	2,292,977	771.4	108.9

In further support of this proposal, the Exchange represents that EEM still qualifies for the initial listing criteria set forth in Rule 5.3(g) for ETFs holding non-U.S. component securities.[6] EEM tracks the performance of the MSCI Emerging Markets Index, which has approximately 800 component securities.[7] ''The MSCI Emerging Markets Index is a free float-adjusted market capitalization index that is designed to measure equity market performance of emerging markets. The MSCI Emerging Markets Index consists of the following 21 emerging market country indices: Brazil, Chile, China, Colombia, Czech Republic, Egypt, Hungary, India, Indonesia, Korea, Malaysia, Mexico, Morocco, Peru, Philippines, Poland, Russia, South Africa, Taiwan, Thailand, and Turkey.''[8] The Exchange represents that more than 50% of the weight of the securities held by EEM are now subject to a comprehensive surveillance agreement (''CSA'').[9] Additionally, the component securities of the MSCI Emerging Markets Index on which EEM is based for which the primary market is in any one country that is not subject to a CSA do not represent 20% or more of the weight of the MSCI Emerging Markets Index.[10] Finally, the component securities of the MSCI Emerging Markets Index on which EEM is based for which the primary market is in any two countries that are not subject to CSAs do not represent 33% or more of the weight of the MSCI Emerging Markets Index.[11]

The Exchange believes that the liquidity in the underlying ETF and the liquidity in EEM options support its request to increase the position and exercise limits for EEM options. As to the underlying ETF, through October 31, 2012 the year-to-date average daily trading volume for EEM across all exchanges was 49.1 million shares. As to EEM options, the year-to-date average daily trading for EEM options across all exchanges was 249,496 contracts.

The Exchange believes that the current position limits on EEM options

[3] By virtue of Exchange Rule 6.9, Commentary .01, which is not being amended by this filing, the exercise limit for EEM options would be similarly increased.

[4] *See* Securities Exchange Act Release No. 40969 (January 22, 1999), 64 FR 4911, 4912–4913 (February 1, 1999) (SR–CBOE–98–23) (citing H.R. No. IFC–3, 96th Cong., 1st Sess. at 189–91 (Comm. Print 1978)).

[5] *Id.,* at 4913.

[6] The Exchange notes that the initial listing criteria for options on ETFs that hold non-U.S. component securities are more stringent than the maintenance listing criteria for those same ETF options. *See* Exchange Rules 5.3(g) and 5.4(k).

[7] *See http://us.ishares.com/product_info/fund/overview/EEM.htm* and *http://www.msci.com/products/indices/licensing/msci_emerging_markets/.* Identification of the specific securities in the EEM and their individual concentrations in the EEM can be accessed at: *http://us.ishares.com/product_info/fund/holdings/EEM.htm.*

[8] *See http://www.msci.com/products/indices/tools/index.html#EM.*

[9] *See* Exchange Rule 5.3(g)(2)(A).

[10] *See* Exchange Rule 5.3(g)(2)(B).

[11] *See* Exchange Rule 5.3(g)(2)(C).

may inhibit the ability of certain large market participants, such as mutual funds and other institutional investors with substantial hedging needs, to utilize EEM options and gain meaningful exposure to the hedging function they provide. The Exchange believes that increasing position limits for EEM options will lead to a more liquid and competitive market environment for EEM options that will benefit customers interested in this product.

Under the Exchange's proposal, the options reporting requirement for EEM options would continue unabated. Thus, the Exchange would still require that each OTP Holder that maintains a position in EEM options on the same side of the market, for its own account or for the account of a customer, report certain information to the Exchange. This information would include, but would not be limited to, the option position, whether such position is hedged and, if so, a description of the hedge, and the collateral used to carry the position, if applicable. In addition, the general reporting requirement for customer accounts that maintain an aggregate position of 200 or more option contracts would remain at this level for EEM options.[12]

As the anniversary of listed options trading approaches its fortieth year, the Exchange believes that the existing surveillance procedures and reporting requirements at the Exchange, other options exchanges, and at the several clearing firms are capable of properly identifying unusual and/or illegal trading activity. In addition, routine oversight inspections of the Exchange's regulatory programs by the Commission have not uncovered any material inconsistencies or shortcomings in the manner in which the Exchange's market surveillance is conducted. These procedures utilize daily monitoring of market movements via automated surveillance techniques to identify unusual activity in both options and underlying stocks.[13]

Furthermore, large stock holdings must be disclosed to the Commission by way of Schedules 13D or 13G.[14] Options positions are part of any reportable positions and, thus, cannot be legally hidden. Moreover, the Exchange's requirement that members or member organizations file reports with the Exchange for any customer who held aggregate large long or short positions of any single class for the previous day will continue to serve as an important part of the Exchange's surveillance efforts.

The Exchange believes that the current financial requirements imposed by the Exchange and by the Commission adequately address concerns that an OTP Holder, or its customer may try to maintain an inordinately large un-hedged position in an option, particularly on EEM. Current margin and risk-based haircut methodologies serve to limit the size of positions maintained by any one account by increasing the margin and/or capital that an OTP Holder must maintain for a large position held by itself or by its customer.[15] In addition, the Commission's net capital rule, Rule 15c3–1 [16] under the Securities Exchange Act of 1934 (the ''Act''), imposes a capital charge on members to the extent of any margin deficiency resulting from the higher margin requirement.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) [17] of the Act, in general, and furthers the objectives of Section 6(b)(5),[18] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. Specifically, the proposed rule change will benefit large Market-Makers (which generally have the greatest potential and actual ability to provide liquidity and depth in the product), as well as retail traders, investors, and public customers, by providing them with a more effective trading and hedging vehicle. In addition, the Exchange believes that the structure of EEM options and the considerable liquidity of the market for EEM options diminish the opportunity to manipulate this product and disrupt the underlying market that a lower position limit may protect against.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [19] and Rule 19b–4(f)(6) thereunder.[20]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay so that it can increase the position and exercise limits for EEM options immediately, which will result in consistency and uniformity among the competing options exchanges as to the position limits for EEM options. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.[21] The Commission notes the proposal is substantively identical to a proposal that was recently approved by the Commission, and does not raise any new regulatory issues.[22] For these

[12] For reporting requirements, *see* Exchange Rule 6.6.

[13] These procedures have been effective for the surveillance of EEM options trading and will continue to be employed.

[14] 17 CFR 240.13d–1.

[15] *See* Exchange Rule 4.15 for a description of margin requirements.

[16] 17 CFR 240.15c3–1.

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(5).

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has fulfilled this requirement.

[21] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[22] *See* Securities Exchange Act Release No. 68086 (October 23, 2012), 77 FR 65600 (October 29, 2012) (SR–CBOE–2012–066).

reasons, the Commission designates the proposed rule change as operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2012–132 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2012–132. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2012–132 and should be submitted on or before January 2, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29855 Filed 12–10–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68362; File No. 4–551]

Program for Allocation of Regulatory Responsibilities Pursuant to Rule 17d–2; Notice of Filing and Order Approving and Declaring Effective an Amendment to the Plan for the Allocation of Regulatory Responsibilities Among NYSE MKT LLC, BATS Exchange, Inc., BOX Options Exchange LLC, C2 Options Exchange, Incorporated, the Chicago Board Options Exchange, Incorporated, the International Securities Exchange LLC, Financial Industry Regulatory Authority, Inc., NYSE Arca, Inc., The NASDAQ Stock Market LLC, NASDAQ OMX BX, Inc., the NASDAQ OMX PHLX, Inc. and Miami International Securities Exchange, LLC Concerning Options-Related Market Surveillance

December 5, 2012.

Notice is hereby given that the Securities and Exchange Commission (''Commission'') has issued an Order, pursuant to Section 17(d) of the Securities Exchange Act of 1934 (''Act''),[1] approving and declaring effective an amendment to the plan for allocating regulatory responsibility (''Plan'') filed on November 20, 2012, pursuant to Rule 17d–2 of the Act,[2] by NYSE MKT LLC (''MKT''), BATS Exchange, Inc., (''BATS''), the BOX Options Exchange LLC (''BOX''), C2 Options Exchange, Incorporated (''C2''), the Chicago Board Options Exchange, Incorporated (''CBOE''), the International Securities Exchange LLC (''ISE''), Financial Industry Regulatory Authority, Inc. (''FINRA''), NYSE Arca, Inc. (''Arca''), The NASDAQ Stock Market LLC (''Nasdaq''), NASDAQ OMX BX, Inc. (''BX''), NASDAQ OMX PHLX, Inc. (''PHLX''), and Miami International Securities Exchange (''MIAX'') (collectively, ''Participating Organizations'' or ''parties'').

I. Introduction

Section 19(g)(1) of the Act,[3] among other things, requires every self-regulatory organization (''SRO'') registered as either a national securities exchange or national securities association to examine for, and enforce compliance by, its members and persons associated with its members with the Act, the rules and regulations thereunder, and the SRO's own rules, unless the SRO is relieved of this responsibility pursuant to Section 17(d)[4] or Section 19(g)(2)[5] of the Act. Without this relief, the statutory obligation of each individual SRO could result in a pattern of multiple examinations of broker-dealers that maintain memberships in more than one SRO (''common members''). Such regulatory duplication would add unnecessary expenses for common members and their SROs.

Section 17(d)(1) of the Act[6] was intended, in part, to eliminate unnecessary multiple examinations and regulatory duplication.[7] With respect to a common member, Section 17(d)(1) authorizes the Commission, by rule or order, to relieve an SRO of the responsibility to receive regulatory reports, to examine for and enforce compliance with applicable statutes, rules, and regulations, or to perform other specified regulatory functions.

To implement Section 17(d)(1), the Commission adopted two rules: Rule 17d–1 and Rule 17d–2 under the Act.[8] Rule 17d–1 authorizes the Commission to name a single SRO as the designated examining authority (''DEA'') to examine common members for compliance with the financial responsibility requirements imposed by the Act, or by Commission or SRO rules.[9] When an SRO has been named as a common member's DEA, all other SROs to which the common member belongs are relieved of the responsibility to examine the firm for compliance with the applicable financial responsibility rules. On its face, Rule 17d–1 deals only with an SRO's obligations to enforce

[23] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78q(d).

[2] 17 CFR 240.17d–2.

[3] 15 U.S.C. 78s(g)(1).

[4] 15 U.S.C. 78q(d).

[5] 15 U.S.C. 78s(g)(2).

[6] 15 U.S.C. 78q(d)(1).

[7] *See* Securities Act Amendments of 1975, Report of the Senate Committee on Banking, Housing, and Urban Affairs to Accompany S. 249, S. Rep. No. 94–75, 94th Cong., 1st Session 32 (1975).

[8] 17 CFR 240.17d–1 and 17 CFR 240.17d–2, respectively.

[9] *See* Securities Exchange Act Release No. 12352 (April 20, 1976), 41 FR 18808 (May 7, 1976).

member compliance with financial responsibility requirements. Rule 17d–1 does not relieve an SRO from its obligation to examine a common member for compliance with its own rules and provisions of the federal securities laws governing matters other than financial responsibility, including sales practices and trading activities and practices.

To address regulatory duplication in these and other areas, the Commission adopted Rule 17d–2 under the Act.[10] Rule 17d–2 permits SROs to propose joint plans for the allocation of regulatory responsibilities with respect to their common members. Under paragraph (c) of Rule 17d–2, the Commission may declare such a plan effective if, after providing for notice and comment, it determines that the plan is necessary or appropriate in the public interest and for the protection of investors, to foster cooperation and coordination among the SROs, to remove impediments to, and foster the development of, a national market system and a national clearance and settlement system, and is in conformity with the factors set forth in Section 17(d) of the Act. Commission approval of a plan filed pursuant to Rule 17d–2 relieves an SRO of those regulatory responsibilities allocated by the plan to another SRO.

II. The Plan

On December 11, 2007, the Commission declared effective the Participating Organizations' Plan for allocating regulatory responsibilities pursuant to Rule 17d–2.[11] On April 11, 2008, the Commission approved an amendment to the Plan to include NASDAQ as a participant.[12] On October 9, 2008, the Commission approved an amendment to the Plan to clarify that the term Regulatory Responsibility for options position limits includes the examination responsibilities for the delta hedging exemption.[13] On February 25, 2010, the Commission approved an amendment to the Plan to add BATS Exchange, Inc. and C2 Options Exchange, Incorporated as SRO participants and to reflect the name changes of the American Stock Exchange LLC to the NYSE Amex LLC, and the Boston Stock Exchange, Inc. to the NASDAQ OMX BX, Inc.[14] On May 11, 2012, the Commission approved an amendment to the Plan to add BOX Options Exchange LLC as a participant to the Plan.[15]

The Plan is designed to reduce regulatory duplication for common members by allocating regulatory responsibility for certain options-related market surveillance matters among the Participating Organizations. Generally, under the Plan, a Participating Organization will serve as the Designated Options Surveillance Regulator (''DOSR'') for each common member assigned to it and will assume regulatory responsibility with respect to that common member's compliance with applicable common rules for certain accounts. When an SRO has been named as a common member's DOSR, all other SROs to which the common member belongs will be relieved of regulatory responsibility for that common member, pursuant to the terms of the Plan, with respect to the applicable common rules specified in Exhibit A to the Plan.

III. Proposed Amendment to the Plan

On November 20, 2012, the parties submitted a proposed amendment to the Plan. The primary purpose of the amendment is to add MIAX as a Participant to the Plan. The amendment also reflects the name change of the NYSE Amex LLC to NYSE MKT LLC. The text of the proposed amended 17d–2 plan is as follows (additions are *italicized;* deletions are [bracketed]):

* * * * *

AGREEMENT BY AND AMONG NYSE *MKT***[AMEX] LLC, BATS EXCHANGE, INC., BOX OPTIONS EXCHANGE LLC NASDAQ OMX BX, INC., C2 OPTIONS EXCHANGE, INCORPORATED, THE CHICAGO BOARD OPTIONS EXCHANGE, INCORPORATED, THE INTERNATIONAL SECURITIES EXCHANGE LLC, FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC., NYSE ARCA, INC., THE NASDAQ STOCK MARKET LLC, [AND]NASDAQ OMX PHLX, INC.,** *AND MIAMI INTERNATIONAL SECURITIES EXCHANGE, LLC* **PURSUANT TO RULE 17d–2 UNDER THE SECURITIES EXCHANGE ACT OF 1934**

This agreement (this ''Agreement''), by and among [the]NYSE [Amex]*MKT* LLC (''[Amex]MKT''), BATS Exchange, Inc., (''BATS''), [the]C2 Options Exchange, Incorporated (''C2''), [the]Chicago Board Options Exchange, Incorporated (''CBOE''), [the]International Securities Exchange LLC (''ISE''), Financial Industry Regulatory Authority, Inc. (''FINRA''), NYSE Arca, Inc. (''Arca''), [The]NASDAQ Stock Market LLC (''Nasdaq''), [the]BOX Options Exchange LLC (''BOX''), NASDAQ OMX BX, Inc. (''BX''), [and the]NASDAQ OMX PHLX, Inc. (''PHLX''), *and Miami International Securities Exchange, LLC (''MIAX'')* is made this 10th day of October 2007, and as amended the 31st day of March 2008, the 1st day of October 2008, the 3rd day of February 2010, [and]the 25th day of April 2012, *and the 19th day of November 2012,* pursuant to Section 17(d) of the Securities Exchange Act of 1934, as amended (the ''Exchange Act''), and Rule 17d–2 thereunder (''Rule 17d–2''), which allows for a joint plan among self-regulatory organizations (''SROs'') to allocate regulatory obligations with respect to brokers or dealers that are members of two or more of the parties to this Agreement (''Common Members''). The [Amex]*MKT,* BATS, C2, CBOE, ISE, FINRA, Arca, Nasdaq, BOX, BX, [and]PHLX*, and MIAX* are collectively referred to herein as the ''Participants'' and individually, each a ''Participant.'' This Agreement shall be administered by a committee known as the Options Surveillance Group (the ''OSG'' or ''Group''), as described in Section V hereof. Unless defined in this Agreement or the context otherwise requires, the terms used herein shall have the meanings assigned thereto by the Exchange Act and the rules and regulations thereunder.

Whereas, the Participants desire to eliminate regulatory duplication with respect to SRO market surveillance of Common Member [1] activities with regard to certain common rules relating to listed options (''Options''); and

Whereas, for this purpose, the Participants desire to execute and file this Agreement with the Securities and Exchange Commission (the ''SEC'' or ''Commission'') pursuant to Rule 17d–2.

Now, therefore, in consideration of the mutual covenants contained in this Agreement, the Participants agree as follows:

I. Except as otherwise provided in this Agreement, each Participant shall assume Regulatory Responsibility (as

[10] *See* Securities Exchange Act Release No. 12935 (October 28, 1976), 41 FR 49091 (November 8, 1976).

[11] *See* Securities Exchange Act Release No. 56941 (December 11, 2007), 72 FR 71723 (December 18, 2007) (File No. 4–551).

[12] *See* Securities Exchange Act Release No. 57649 (April 11, 2008), 73 FR 20976 (April 17, 2008) (File No. 4–551).

[13] *See* Securities Exchange Act Release No. 58765 (October 9, 2008), 73 FR 62344 (October 20, 2008) (File No. 4–551).

[14] *See* Securities Exchange Act Release No. 61588 (February 25, 2010), 75 FR 9970 (March 4, 2010) (File No. 4–551).

[15] *See* Securities Exchange Act Release No. 66975 (May 11, 2012), 77 FR 29712 (May 18, 2010) (File No. 4–551).

[1] In the case of the BX and BOX, members are those persons who are Options Participants (as defined in the BOX Options Exchange LLC Rules and NASDAQ OMX BX, Inc. Rules).

defined below) for the Common Members that are allocated or assigned to such Participant in accordance with the terms of this Agreement and shall be relieved of its Regulatory Responsibility as to the remaining Common Members. For purposes of this Agreement, a Participant shall be considered to be the Designated Options Surveillance Regulator (''DOSR'') for each Common Member that is allocated to it in accordance with Section VII.

II. As used in this Agreement, the term ''Regulatory Responsibility'' shall mean surveillance, investigation and enforcement responsibilities relating to compliance by the Common Members with such Options rules of the Participants as the Participants shall determine are substantially similar and shall approve from time to time, insofar as such rules relate to market surveillance (collectively, the ''Common Rules''). For the purposes of this Agreement the list of Common Rules is attached as Exhibit A hereto, which may only be amended upon unanimous written agreement by the Participants. The DOSR assigned to each Common Member shall assume Regulatory Responsibility with regard to that Common Member's compliance with the applicable Common Rules for certain accounts.[2] A DOSR may perform its Regulatory Responsibility or enter an agreement to transfer or assign such responsibilities to a national securities exchange registered with the SEC under Section 6(a) of the Exchange Act or a national securities association registered with the SEC under Section 15A of the Exchange Act. A DOSR may not transfer or assign its Regulatory Responsibility to an association registered for the limited purpose of regulating the activities of members who are registered as brokers or dealers in security futures products.

The term ''Regulatory Responsibility'' does not include, and each Participant shall retain full responsibility with respect to:

(a) Surveillance, investigative and enforcement responsibilities other than those included in the definition of Regulatory Responsibility;

(b) any aspects of the rules of a Participant that are not substantially similar to the Common Rules or that are allocated for a separate surveillance purpose under any other agreement made pursuant to Rule 17d–2. Any such aspects of a Common Rule will be noted as excluded on Exhibit A.

With respect to options position limits, the term Regulatory Responsibility shall include examination responsibilities for the delta hedging exemption. Specifically, the Participants intend that FINRA will conduct examinations for delta hedging for all Common Members that are members of FINRA notwithstanding the fact that FINRA's position limit rule is, in some cases, limited to only firms that are not members of an options exchange (i.e., access members). In such cases, FINRA's examinations for delta hedging options position limit violations will be for the identical or substantively similar position limit rule(s) of the other Participant(s). Examinations for delta hedging for Common Members that are non-FINRA members will be conducted by the same Participant conducting position limit surveillance. The allocation of Common Members to DOSRs for surveillance of compliance with options position limits and other agreed to Common Rules is provided in Exhibit B. The allocation of Common Members to DOSRs for examinations of the delta hedging exemption under the options position limits rules is provided in Exhibit C.

III. Each year within 30 days of the anniversary date of the commencement of operation of this Agreement, or more frequently if required by changes in the rules of a Participant, each Participant shall submit to the other Participants, through the Chair of the OSG, an updated list of Common Rules for review. This updated list may add Common Rules to Exhibit A, shall delete from Exhibit A rules of that Participant that are no longer identical or substantially similar to the Common Rules, and shall confirm that the remaining rules of the Participant included on Exhibit A continue to be identically or substantially similar to the Common Rules. Within 30 days from the date that each Participant has received revisions to Exhibit A from the Chair of the OSG, each Participant shall confirm in writing to the Chair of the OSG whether that Participant's rules listed in Exhibit A are Common Rules.

IV. Apparent violation of another Participant's rules discovered by a DOSR, but which rules are not within the scope of the discovering DOSR's Regulatory Responsibility, shall be referred to the relevant Participant for such action as is deemed appropriate by that Participant.

Notwithstanding the foregoing, nothing contained herein shall preclude a DOSR in its discretion from requesting that another Participant conduct an investigative or enforcement proceeding (''Proceeding'') on a matter for which the requesting DOSR has Regulatory Responsibility. If such other Participant agrees, the Regulatory Responsibility in such case shall be deemed transferred to the accepting Participant and confirmed in writing by the Participants involved. Additionally, nothing in this Agreement shall prevent another Participant on whose market potential violative activity took place from conducting its own Proceeding on a matter. The Participant conducting the Proceeding shall advise the assigned DOSR. Each Participant agrees, upon request, to make available promptly all relevant files, records and/or witnesses necessary to assist another Participant in a Proceeding.

V. The OSG shall be composed of one representative designated by each of the Participants (a ''Representative''). Each Participant shall also designate one or more persons as its alternate representative(s) (an ''Alternate Representative''). In the absence of the Representative, the Alternate Representative shall assume the powers, duties and responsibilities of the Representative. Each Participant may at any time replace its Representative and/or its Alternate Representative to the Group.[3] A majority of the OSG shall constitute a quorum and, unless otherwise required, the affirmative vote of a majority of the Representatives present (in person, by telephone or by written consent) shall be necessary to constitute action by the Group.

The Group will have a Chair, Vice Chair and Secretary. A different Participant will assume each position on a rotating basis for a one-year term. In the event that a Participant replaces a Representative who is acting as Chair, Vice Chair or Secretary, the newly appointed Representative shall assume the position of Chair, Vice Chair, or Secretary (as applicable) vacated by the Participant's former Representative. In the event a Participant cannot fulfill its duties as Chair, the Participant serving as Vice Chair shall substitute for the Chair and complete the subject unfulfilled term. All notices and other communications for the OSG are to be sent in care of the Chair and, as appropriate, to each Representative.

VI. The OSG shall determine the times and locations of Group meetings, provided that the Chair, acting alone, may also call a meeting of the Group in the event the Chair determines that there is good cause to do so. To the extent reasonably possible, notice of any

[2] Certain accounts shall include customer (''C'' as classified by the Options Clearing Corporation (''OCC'')) and firm (''F'' as classified by OCC) accounts, as well as other accounts, such as market maker accounts as the Participants shall, from time to time, identify as appropriate to review.

[3] A Participant must give notice to the Chair of the Group of such a change.

meeting shall be given at least ten business days prior to the meeting date. Representatives shall always be given the option of participating in any meeting telephonically at their own expense rather than in person.

VII. No less frequently than every two years, in such manner as the Group deems appropriate, the OSG shall allocate Common Members that conduct an Options business among the Participants (''Allocation''), and the Participant to which a Common Member is allocated will serve as the DOSR for that Common Member. Any Allocation shall be based on the following principles, except to the extent all affected Participants consent to one or more different principles:

(a) The OSG may not allocate a Common Member to a Participant unless the Common Member is a member of that Participant.

(b) To the extent practicable, Common Members that conduct an Options business shall be allocated among the Participants of which they are members in such manner as to equalize as nearly as possible the allocation among such Participants, provided that no Common Members shall be allocated to FINRA. For example, if sixteen Common Members that conduct an Options business are members only of three Participants, none of which is FINRA, those Common Members shall be allocated among the three Participants such that no Participant is allocated more than six such members and no Participant is allocated less than five such members. If, in the previous example, one of the three Participants is FINRA, the sixteen Common Members would be allocated evenly between the remaining Participants, so that the two non-FINRA Participants would be allocated eight Common Members each.

(c) To the extent practicable, Allocation shall take into account the amount of Options activity conducted by each Common Member in order to most evenly divide the Common Members with the largest amount of activity among the Participants of which they are members. Allocation will also take into account similar allocations pursuant to other plans or agreements to which the Common Members are party to maintain consistency in oversight of the Common Members.[4]

(d) To the extent practicable, Allocation of Common Members to Participants will be rotated among the applicable Participants such that a Common Member shall not be allocated to a Participant to which that Common Member was allocated within the previous two years. The assignment of DOSRs pursuant to the Allocation is attached as Exhibit B hereto, and will be updated from time to time to reflect Common Member Allocation changes.

(e) The Group may reallocate Common Members from time-to-time, as it deems appropriate.

(f) Whenever a Common Member ceases to be a member of its DOSR, the DOSR shall promptly inform the Group, which shall review the matter and allocate the Common Member to another Participant.

(g) A DOSR may request that a Common Member to which it is assigned be reallocated to another Participant by giving 30 days written notice to the Chair of the OSG. The Group, in its discretion, may approve such request and reallocate the Common Member to another Participant.

(h) All determinations by the Group with respect to Allocation shall be made by the affirmative vote of a majority of the Participants that, at the time of such determination, share the applicable Common Member being allocated; a Participant shall not be entitled to vote on any Allocation relating to a Common Member unless the Common Member is a member of such Participant.

VIII. Each DOSR shall conduct routine surveillance reviews to detect violations of the applicable Common Rules by each Common Member allocated to it with a frequency (daily, weekly, monthly, quarterly, semi-annually or annually as noted on Exhibit A) not less than that determined by the Group. The other Participants agree that, upon request, relevant information in their respective files relative to a Common Member will be made available to the applicable DOSR. In addition, each Participant shall provide, to the extent not otherwise already provided, information pertaining to its surveillance program that would be relevant to FINRA or the Participant(s) conducting routine examinations for the delta hedging exemption.

At each meeting of the OSG, each Participant shall be prepared to report on the status of its surveillance program for the previous quarter and any period prior thereto that has not previously been reported to the Group. In the event a DOSR believes it will not be able to complete its Regulatory Responsibility for its allocated Common Members, it will so advise the Group in writing promptly. The Group will undertake to remedy this situation by reallocating the subject Common Members among the remaining Participants. In such instance, the Group may determine to impose a regulatory fee for services provided to the DOSR that was unable to fulfill its Regulatory Responsibility.

IX. Each Participant will, upon request, promptly furnish a copy of the report or applicable portions thereof relating to any investigation made pursuant to the provisions of this Agreement to each other Participant of which the Common Member under investigation is a member.

X. Each Participant will routinely populate a common database, to be accessed by the Group relating to any formal regulatory action taken during the course of a Proceeding with respect to the Common Rules concerning a Common Member.

XI. Any written notice required or permitted to be given under this Agreement shall be deemed given if sent by certified mail, return receipt requested, to any Participant to the attention of that Participant's Representative, to the Participant's principal place of business or by email at such address as the Representative shall have filed in writing with the Chair.

XII. The costs incurred by each Participant in discharging its Regulatory Responsibility under this Agreement are not reimbursable. However, any of the Participants may agree that one or more will compensate the other(s) for costs incurred.

XIII. The Participants shall notify the Common Members of this Agreement by means of a uniform joint notice approved by the Group. Each Participant will notify the Common Members that have been allocated to it that such Participant will serve as DOSR for that Common Member.

XIV. This Agreement shall be effective upon approval of the Commission. This Agreement may only be amended in writing duly approved by each Participant. All amendments to this Agreement, excluding changes to Exhibits A, B and C, must be filed with and approved by the Commission.

XV. Any Participant may manifest its intention to cancel its participation in this Agreement at any time upon providing written notice to (i) the Group six months prior to the date of such cancellation, or such other period as all the Participants may agree, and (ii) the Commission. Upon receipt of the notice the Group shall allocate, in accordance with the provisions of this Agreement, those Common Members for which the canceling Participant was the DOSR. The canceling Participant shall retain its Regulatory Responsibility and other rights, privileges and duties pursuant to this Agreement until the Group has

[4] For example, if one Participant was allocated a Common Member by another regulatory group that Participant would be assigned to be the DOSR of that Common Member, unless there is good cause not to make that assignment.

completed the reallocation as described above, and the Commission has approved the cancellation.

XVI. The cancellation of its participation in this Agreement by any Participant shall not terminate this Agreement as to the remaining Participants. This Agreement will only terminate following notice to the Commission, in writing, by the then Participants that they intend to terminate the Agreement and the expiration of the applicable notice period. Such notice shall be given at least six months prior to the intended date of termination, or such other period as all the Participants may agree. Such termination will become effective upon Commission approval.

XVII. Participation in the Group shall be strictly limited to the Participants and no other party shall have any right to attend or otherwise participate in the Group except with the unanimous approval of all Participants. Notwithstanding the foregoing, any national securities exchange registered with the SEC under Section 6(a) of the Act or any national securities association registered with the SEC under section 15A of the Act may become a Participant to this Agreement provided that: (i) Such applicant has adopted rules substantially similar to the Common Rules, and received approval thereof from the SEC; (ii) such applicant has provided each Participant with a signed statement whereby the applicant agrees to be bound by the terms of this Agreement to the same effect as though it had originally signed this Agreement and (iii) an amended agreement reflecting the addition of such applicant as a Participant has been filed with and approved by the Commission.

XVIII. This Agreement is wholly separate from the multiparty Agreement made pursuant to Rule 17d–2 by and among the *NYSE MKT LLC*[American Stock Exchange, LLC], the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, Inc., the International Securities Exchange, LLC, Financial Industry Regulatory Authority, The NASDAQ Stock Market LLC, Inc., the New York Stock Exchange, LLC, the NYSE Arca, Inc., [and]the Philadelphia Stock Exchange, Inc.*, and Miami International Securities Exchange, LLC* involving the allocation of regulatory responsibilities with respect to common members for compliance with common rules relating to the conduct by broker-dealers of accounts for listed options or index warrants entered into on June 5, 2008, and as may be amended from time to time.

Limitation of Liability

No Participant nor the Group nor any of their respective directors, governors, officers, employees or representatives shall be liable to any other Participant in this Agreement for any liability, loss or damage resulting from or claimed to have resulted from any delays, inaccuracies, errors or omissions with respect to the provision of Regulatory Responsibility as provided hereby or for the failure to provide any such Regulatory Responsibility, except with respect to such liability, loss or damages as shall have been suffered by one or more of the Participants and caused by the willful misconduct of one or more of the other Participants or its respective directors, governors, officers, employees or representatives. No warranties, express or implied, are made by the Participants, individually or as a group, or by the OSG with respect to any Regulatory Responsibility to be performed hereunder.

Relief From Responsibility

Pursuant to Section 17(d)(1)(A) of the Exchange Act and Rule 17d–2, the Participants join in requesting the Commission, upon its approval of this Agreement or any part thereof, to relieve the Participants that are party to this Agreement and are not the DOSR as to a Common Member of any and all Regulatory Responsibility with respect to the matters allocated to the DOSR.

VIOLATION I—EXPIRING EXERCISE DECLARATIONS (EED)—FOR LISTED EQUITY OPTIONS EXPIRING: THE THIRD SATURDAY FOLLOWING THE THIRD FRIDAY OF A MONTH, QUARTERLY, AND FOR LISTED FLEX OPTIONS

SRO	Description of rule	Exchange Rule No.	Frequency of review
BATS	Exercise of Options Contracts	Rule 23.1	At Expiration.
BOX	Exercise of Options Contracts	Rule 9000	At Expiration.
C2	Exercise of Options Contracts	Rule 11.1	At Expiration.
CBOE	Exercise of Options Contracts	Rule 11.1	At Expiration.
FINRA	Exercise of Options Contracts	Rule 2360(b)(23)	At Expiration.
ISE	Exercise of Options Contracts	Rule 1100	At Expiration.
MIAX	*Exercise of Options Contracts*	*Rule 700*	*At Expiration.*
Nasdaq	Exercise of Options Contracts	Nasdaq Chapter VIII, Sec. 1	At Expiration.
NYSE Arca	Exercise of Options Contracts	Rule 6.24	At Expiration.
NYSE [Amex]*MKT*	Exercise of Options Contracts	Rule 980	At Expiration.
NASDAQ OMX BX	Exercise of Options Contracts	Chapter VII, Section 1	At Expiration.
NASDAQ OMX PHLX	Exercise of Equity Options Contracts	Rule 1042	At Expiration.

VIOLATION II—POSITION LIMITS (PL)—FOR LISTED EQUITY OPTIONS EXPIRING: THE THIRD SATURDAY FOLLOWING THE THIRD FRIDAY OF A MONTH, QUARTERLY

SRO	Description of rule (for review as they apply to PL)	Exchange rule No.	Frequency of review
BATS	Position Limits	Rule 18.7	Daily.
	Exemptions from Position	Rule 18.8	As Needed.
	Liquidating Positions	Rule 18.11	As Needed.
BOX	Position Limits	Rule 3120	Daily.
	Exemptions from Position	Rule 3130	As Needed.
	Liquidating Positions	Rule 3160	As Needed.
C2	Position Limits	Rule 4.11	Daily.
	Liquidating Positions	Rule 4.14	As Needed.
CBOE	Position Limits	Rule 4.11	Daily.
	Liquidating Positions	Rule 4.14	As Needed.
FINRA	Position Limits	Rule 2360(b)(3)	Daily.
	Liquidation of Positions and Restrictions on Access.	Rule 2360(b)(6)	As Needed.
ISE	Position Limits	Rule 412	Daily.
	Exemptions from Position Limits	Rule 413	As Needed.
	Liquidating Positions	Rule 416	As Needed.
MIAX	*Position Limits*	*Rule 307*	*Daily.*
	Exemptions from Position Limits	*Rule 308*	*As Needed.*
	Liquidating Positions	*Rule 311*	*As Needed.*
Nasdaq	Position Limits	[Nasdaq Rule] Chapter III, Section 7	Daily.
	Exemptions from Position Limits	[Nasdaq Rule] Chapter III, Section 8	As Needed.
	Liquidating Positions	[Nasdaq Rule] Chapter III, Section 11	As Needed.
NYSE Arca	Position Limits	Rule 6.8	Daily.
	Liquidation of Positions	Rule 6.7	As Needed.
NYSE [Amex] *MKT*	Position Limits	Rule 904	Daily.
	Liquidating Positions	Rule 907	As Needed.
NASDAQ OMX BX	Position Limits	Chapter III, Section 7	Daily.
	Exemptions from Position Limits	Chapter III, Section 8	As Needed.
	Liquidating Positions	Chapter III, Section 11	As Needed.
NASDAQ OMX PHLX	Position Limits	Rule 1001	Daily.
	Liquidation of Positions	Rule 1004	As Needed.

VIOLATION III—LARGE OPTION POSITION REPORT (LOPR)—FOR LISTED EQUITY AND ETF OPTIONS

SRO	Description of rule (for review as they apply to LOPR)	Exchange Rule No.	Frequency of review
BATS	Reports Related to Position Limits	Rule 18.10	Yearly.
BOX	Reports Related to Position Limits	Rule 3150	Yearly.
C2	Reports Related to Position Limits	Rule 4.13(a)	Yearly.
	Reports Related to Position Limits	Rule 4.13(b)	Yearly.
	Reports Related to Position Limits	Rule 4.13(d)	Yearly.
CBOE	Reports Related to Position Limits	Rule 4.13(a)	Yearly.
	Reports Related to Position Limits	Rule 4.13(b)	Yearly.
	Reports Related to Position Limits	Rule 4.13(d)	Yearly.
FINRA	Options	Rule 2360(b)(5)	Yearly.
ISE	Reports Related to Position Limits	Rule 415	Yearly.
MIAX	*Reports Related to Position Limits*	*Rule 310*	*Yearly.*
Nasdaq	Reports Related to Position Limits	Chapter III, Section 10	Yearly.
NYSE Arca	Reporting of Options Positions	Rule 6.6	Yearly.

VIOLATION III—LARGE OPTION POSITION REPORT (LOPR)—FOR LISTED EQUITY AND ETF OPTIONS—Continued

SRO	Description of rule (for review as they apply to LOPR)	Exchange Rule No.	Frequency of review
NYSE [Amex] MKT	Reporting of Options Positions	Rule 906	Yearly.
Nasdaq OMX BX	Reports Related to Position Limits	Chapter III, Section 10	Yearly.
NASDAQ OMX PHLX	Reporting of Options Positions	Rule 1003	Yearly.

VIOLATION IV—OPTIONS CLEARING CORPORATION (OCC) ADJUSTMENT PROCESS

SRO	Description of Rule (as they apply to OCC Adjustments/By-Laws Article V, Section 1.01(a) and .02)	Exchange Rule No.	Frequency of review
BATS	Adherence to Law	Rule 18.1	Yearly.
BOX	Adherence to Law	Rule 3010	Yearly.
C2	Adherence to Law	Rule 4.2	Yearly.
CBOE	Adherence to Law	Rule 4.2	Yearly.
FINRA	Violation of By-Laws and Rules of FINRA or the OCC.	Rule2360(b)(21)	Yearly.
ISE	Adherence to Law	Rule 401	Yearly.
MIAX	*Adherence to Law*	*Rule 300*	*Yearly.*
Nasdaq	Adherence to Law	Chapter III, Section 1	Yearly.
NYSE Arca	Adherence to Law and Good Business Practice.	Rule 11.1	Yearly.
NYSE [Amex]MKT	Business Conduct	Rule 16	Yearly.
NASDAQ OMX BX	Adherence to Law	Chapter III, Section 1	Yearly.
NASDAQ OMX PHLX	Violation of By-Laws and Rules of OCC	Rule 1050	Yearly.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov.* Please include File Number 4–551 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number 4–551. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed plan that are filed with the Commission, and all written communications relating to the proposed plan between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the plan also will be available for inspection and copying at the principal offices of MKT, BATS, C2, CBOE, ISE, FINRA, Arca, NASDAQ, BOX, BX, Phlx and MIAX. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number *4–551* and should be submitted on or before January 2, 2013.

V. Discussion

The Commission continues to believe that the Plan, as proposed to be amended, is an achievement in cooperation among the SRO participants. The Plan, as amended, will reduce unnecessary regulatory duplication by allocating to the designated SRO the responsibility for certain options-related market surveillance matters that would otherwise be performed by multiple SROs. The Plan promotes efficiency by reducing costs to firms that are members of more than one of the SRO participants. In addition, because the SRO participants coordinate their regulatory functions in accordance with the Plan, the Plan promotes, and will continue to promote, investor protection. Under paragraph (c) of Rule 17d–2, the Commission may, after appropriate notice and comment, declare a plan, or any part of a plan,

effective. In this instance, the Commission believes that appropriate notice and comment can take place after the proposed amendment is effective. The primary purpose of the amendment is to add MIAX as a Participant to the Plan. By declaring it effective today, the amended Plan can become effective and be implemented without undue delay.[16] In addition, the Commission notes that the prior version of this Plan was published for comment, and the Commission did not receive any comments thereon.[17] Finally, the Commission does not believe that the amendment to the Plan raises any new regulatory issues that the Commission has not previously considered.

VI. Conclusion

This order gives effect to the amended Plan submitted to the Commission that is contained in File No. 4–551.

It is therefore ordered, pursuant to Section 17(d) of the Act, that the Plan, as amended by and between MKT, BATS, C2, CBOE, ISE, FINRA, Arca, NASDAQ, BOX, BX, Phlx and MIAX, filed with the Commission pursuant to Rule 17d-2 on November 20, 2012 is hereby approved and declared effective.

It is further ordered that those SRO participants that are not the DOSR as to a particular common member are relieved of those regulatory responsibilities allocated to the common member's DOSR under the amended Plan to the extent of such allocation.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29842 Filed 12–10–12; 8:45 am]

BILLING CODE 8011–01–P

[16] On December 3, 2012, the Commission granted MIAX's application for registration as a national securities exchange. *See* Securities Exchange Act Release No. 68341 (File No. 10–207).

[17] *See supra* note 15 (citing to Securities Exchange Act Release No. 66975).

[18] 17 CFR 200.30–3(a)(34).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68353; File No. SR–NYSE–2012–70]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Rule 472, Which Addresses Communications With the Public, Adopting New Rule Text To Conform to the Changes Adopted by the Financial Industry Regulatory Authority, Inc. for Research Analysts and Research Reports as Required by the Jumpstart Our Business Startups Act

December 4, 2012.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on November 30, 2012, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'' or ''SEC'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Rule 472, which addresses communications with the public, to adopt new rule text to conform to the changes adopted by the Financial Industry Regulatory Authority, Inc. (''FINRA'') for research analysts and research reports as required by the Jumpstart our Business Startups Act (the ''JOBS Act'').[4] The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NYSE Rule 472, which addresses communications with the public, to adopt new rule text to conform to the changes adopted by FINRA for research analysts and research reports as required by the JOBS Act.[5]

Background

On July 30, 2007, FINRA's predecessor, the National Association of Securities Dealers, Inc. (''NASD''), and NYSE Regulation, Inc. (''NYSER'') consolidated their member firm regulation operations into a combined organization, FINRA. Pursuant to Rule 17d–2 under the Securities Exchange Act of 1934, as amended (the ''Act''), NYSE, NYSER and FINRA entered into an agreement (the ''Agreement'') to reduce regulatory duplication for their members by allocating to FINRA certain regulatory responsibilities for certain NYSE rules and rule interpretations (''FINRA Incorporated NYSE Rules''). NYSE MKT LLC (''NYSE MKT'') became a party to the Agreement effective December 15, 2008.[6]

As part of its effort to reduce regulatory duplication and relieve firms that are members of FINRA, NYSE and NYSE MKT of conflicting or unnecessary regulatory burdens, FINRA is now engaged in the process of reviewing and amending the NASD and FINRA Incorporated NYSE Rules in order to create a consolidated FINRA rulebook.[7]

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] Public Law 112–106, 126 Stat. 306.

[5] *See* Securities Exchange Act Release No. 68037 (October 11, 2012), 77 FR 63908 (October 17, 2012) (SR–FINRA–2012–045). *See also* FINRA Regulatory Notice 12–49.

[6] *See* Securities Exchange Act Release Nos. 56148 (July 26, 2007), 72 FR 42146 (August 1, 2007) (order approving the Agreement); 56147 (July 26, 2007), 72 FR 42166 (August 1, 2007) (SR–NASD–2007–054) (order approving the incorporation of certain NYSE Rules as ''Common Rules''); and 60409 (July 30, 2009), 74 FR 39353 (August 6, 2009) (order approving the amended and restated Agreement, adding NYSE MKT LLC as a party). Paragraph 2(b) of the Agreement sets forth procedures regarding proposed changes by FINRA, NYSE or NYSE MKT to the substance of any of the Common Rules.

[7] FINRA's rulebook currently has three sets of rules: (1) NASD Rules, (2) FINRA Incorporated NYSE Rules, and (3) consolidated FINRA Rules. The FINRA Incorporated NYSE Rules apply only to those members of FINRA that are also members of

Proposed Rule Change

The Exchange proposes to amend NYSE Rule 472 to adopt new rule text to conform to the changes adopted by FINRA for research analysts and research reports in NASD Rule 2711 and FINRA Incorporated NYSE Rule 472. FINRA amended these rules primarily to conform to the requirements of the JOBS Act. The proposed changes to NYSE Rule 472 are identical to the changes FINRA made to FINRA Incorporated NYSE Rule 472.

The JOBS Act was signed into law on April 5, 2012. Among other things, the JOBS Act is intended to help facilitate capital formation for ''emerging growth companies'' (''EGCs'') by improving the information flow about EGCs to investors. To that end, Section 105(b) of the JOBS Act amended Section 15D of the Act to prohibit the Commission or any national securities association from adopting or maintaining any rule or regulation in connection with an initial public offering (''IPO'') of an EGC that:

- Restricts, based on functional role, which associated persons of a broker, dealer or member of a national securities association, may arrange for communications between an analyst and a potential investor; or
- Restricts a securities analyst from participating in any communication with the management of an EGC that is also attended by any other associated person of a broker, dealer, or member of a national securities association whose functional role is other than as a securities analyst.

Section 105(d) further prohibits the Commission or any national securities association from adopting or maintaining any rule or regulation that prohibits a broker or dealer from publishing or distributing any research report or making a public appearance, with respect to the securities of an EGC either:

- Within any prescribed period of time following the IPO date of the EGC; or
- Within any prescribed period of time prior to the expiration date of any agreement between the broker, dealer, or member of a national securities association and the EGC or its shareholders that restricts or prohibits the sale of securities held by the EGC or its shareholders after the IPO date.

These provisions became effective upon signature of the President of the United States on April 5, 2012. On August 22, 2012, the SEC's Division of Trading and Markets provided guidance on these provisions in the form of Frequently Asked Questions (''FAQs'').[8] The Exchange is amending NYSE Rule 472 to conform with FINRA's amendments to the applicable provisions of NASD Rule 2711 and FINRA Incorporated NYSE Rule 472 to conform to the JOBS Act and the SEC staff's guidance with regard to the applicable JOBS Act provisions. The SEC staff guidance interprets the JOBS Act provisions as applicable to FINRA Incorporated NYSE Rule 472 to the same extent as NASD Rule 2711. As such, FINRA made corresponding amendments to Incorporated NYSE Rule 472. The proposed rule change corresponds identically to FINRA's amendments to FINRA Incorporated NYSE Rule 472.[9]

Arranging and Participating in Communications

NYSE Rule 472(b)(5) prohibits a research analyst from participating ''in efforts to solicit investment banking business,'' including any ''pitches'' for investment banking business or other communications with companies for the purpose of soliciting investment banking business. The FAQs interpret the JOBS Act to now allow, in connection with an IPO of an EGC, research analysts to attend meetings with issuer management that are also attended by investment banking personnel, including pitch meetings, but not ''engage in otherwise prohibited conduct in such meetings,'' including ''efforts to solicit investment banking business.'' The FAQs further explain that a research analyst that attends a pitch meeting ''could, for example, introduce themselves, outline their research program and the types of factors that the analyst would consider in his or her analysis of a company, and ask follow-up questions to better understand a factual statement made by the [EGC's] management.'' Accordingly, the proposed rule change creates an exception to NYSE Rule 472(b)(5) to reflect this guidance regarding the application of the JOBS Act.

The FAQs state that under Section 105(b) of the JOBS Act, an associated person of a broker-dealer, including investment banking personnel, may arrange communications between research analysts and investors in connection with an IPO of an EGC. As an example, the FAQs state that an investment banker could forward a list of clients to a research analyst that the analyst could, ''at his or her own discretion and with appropriate controls, contact.'' The FAQs acknowledge that no self-regulatory organization, including the Exchange, has a rule directly prohibiting this activity and further states that such activity, without more, would not constitute conduct by investment banking personnel to directly or indirectly direct a research analyst to engage in sales or marketing efforts related to an investment banking services transaction, in violation of NYSE Rule 472(b)(6)(ii).[10] Accordingly, this JOBS Act provision requires no conforming rule change.

Quiet Periods

Section 105(d) of the JOBS Act expressly permits publication of research and public appearances with respect to the securities of an EGC any time after the IPO of an EGC or prior to the expiration of any lock-up agreement. While the JOBS Act refers only to the ''expiration'' of a lock-up agreement, the FAQs note the Commission staff's belief that Congress intended for the JOBS Act provisions to apply equally to the period before a ''waiver'' or ''termination'' of a lock-up agreement. Thus, in accordance with SEC staff guidance on this JOBS Act provision, the proposed rule change amends NYSE Rule 472 to eliminate the following quiet periods with respect to an IPO of an EGC:

- NYSE Rule 472(f)(1), which imposes a 40-day quiet period after an IPO on a member organization that acts as a manager or co-manager of such IPO;
- NYSE Rule 472(f)(3), which imposes a 25-day quiet period after an IPO on a member organization that participates as an underwriter or dealer (other than manager or co-manager) of such an IPO; and
- NYSE Rule 472(f)(4) with respect to the 15-day quiet period applicable to IPO managers and co-managers prior to the expiration, waiver, or termination of a lock-up agreement or any other agreement that such member organization has entered into with a subject company or its shareholders that restricts or prohibits the sale of securities held by the subject company

the NYSE (''Dual Members''), while the consolidated FINRA Rules apply to all FINRA members. For more information about the FINRA rulebook consolidation process, *see* FINRA Information Notice, March 12, 2008.

[8] These FAQs are available at *http://www.sec.gov/divisions/marketreg/tmjobsact-researchanalystsfaq.htm*.

[9] *See supra* note 5.

[10] *See supra* note 8. In 2003 and 2004, the Commission, self-regulatory organizations, and other regulators instituted settled enforcement actions against 12 broker-dealers to address conflicts of interest between the firms' research and investment banking functions (''Global Settlement''). As the guidance point out, firms subject to the Global Settlement should also be mindful of the requirements of that court order as they remain in place.

or its shareholders after the completion of an IPO.

The FAQs note that the JOBS Act makes no reference to quiet periods after a secondary offering or during a period of time after expiration, termination or waiver of a lock-up agreement. Accordingly, the FAQs note that NYSE Rule 472(f)(2), which imposes a 10-day quiet period on managers and co-managers following a secondary offering and the remaining portion of NYSE Rule 472(f)(4) relating to quiet periods *after* the expiration, termination or waiver of a lock-up agreement, remain fully in effect. Nonetheless, the FAQs express the SEC staff's belief that the policies underlying the JOBS Act are equally applicable to quiet periods during these other times. The Exchange agrees that elimination of those quiet periods would advance the policy objectives of the JOBS Act and therefore has proposed to amend NYSE Rule 472(f) accordingly.

The Exchange also proposes to make a non-substantive change to correct the existing text of current NYSE Rule 472(f)(6), which would become NYSE Rule 472(f)(7) as a result of the proposed changes described above.

2. Statutory Basis

The Exchange believes that the proposed change is consistent with Section 6(b) of the Act,[11] in general, and furthers the objectives of Section 6(b)(5) of the Act,[12] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system.

The proposed changes to NYSE Rules 472(b)(5), (f)(1), (f)(3) and (f)(4) (with respect to the 15-day quiet period before the expiration, termination or waiver of a lock-up agreement) conform those rules to statutory mandates. The proposed additional changes to NYSE Rules 472(f)(2) and (f)(4) further the policies underlying the statutory mandates by improving information flow to investors with respect to EGCs without sacrificing the reliability of research reports, as the other objectivity safeguards in NYSE Rule 472 and SEC Regulation AC[13] are effective and will continue to apply. In addition, the Exchange believes that the proposed rule changes will remove impediments to and perfect the mechanisms of a free and open market and a national market system not only because it will conform Exchange rules to statutory mandates, but also because it will harmonize Exchange rules with identical FINRA rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[14] and Rule 19b–4(f)(6) thereunder.[15] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.[16]

A proposed rule change filed under Rule 19b–4(f)(6)[17] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[18] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission hereby grants the request.[19] Waiving the 30-day operative delay will allow the Exchange to conform its rules to statutory mandates and harmonize Exchange rules with identical FINRA rules. The Commission believes it is consistent with the protection of investors and the public interest to waive the 30-day operative delay and, therefore, designates the proposal as operative upon filing.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2012–70 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2012–70. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

[13] 17 CFR 242.500–05.

[14] 15 U.S.C. 78s(b)(3)(A)(iii).

[15] 17 CFR 240.19b–4(f)(6).

[16] In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of the filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[17] 17 CFR 240.19b–4(f)(6).

[18] 17 CFR 240.19b–4(f)(6)(iii).

[19] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Section, 100 F Street NE., Washington, DC 20549–1090. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at *www.nyse.com.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2012–70 and should be submitted on or before January 2, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29852 Filed 12–10–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68361; File No. SR–BOX–2012–020]

Self-Regulatory Organizations; BOX Options Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposal To Expand the Short Term Options Series Program

December 5, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on December 4, 2012, BOX Options Exchange LLC (the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

BOX Options Exchange LLC (the ''Exchange'') proposes to amend interpretive material to Rule 5050 and to Rule 6090 to expand the Short Term Option Series Program. The text of the proposed rule change is available from the principal office of the Exchange, on the Exchange's Internet Web site at *http://boxexchange.com,* and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend IM–5050–6 to Rule 5050 and IM–6090–2 to Rule 6090 to provide for the ability to open up to five consecutive expirations under the Short Term Option Series Program (''Weeklys Program'') for trading on BOX, to allow for the Exchange to delist certain series in the Weeklys Program that do not have open interest and to expand the number of series in the Weeklys Program under limited circumstances when there are no series at least 10% but not more than 30% away from the current price of the underlying security.[3]

Currently, BOX may select up to 30 currently listed option classes on which Short Term Option Series (''STOS'') may be opened in the Weeklys Program and BOX may also match any option classes that are selected by other securities exchanges that employ a similar program under their respective rules.[4] For each option class eligible for participation in the Weeklys Program, the Exchange may open up to 30 STOS for each expiration date in that class.

This proposal seeks to allow the Exchange to open STOS for up to five consecutive week expirations. The Exchange intends to add a maximum of five consecutive week expirations under the Weeklys Program; however it will not add a STOS expiration in the same week that a monthly options series expires or, in the case of Quarterly Option Series, on an expiration that coincides with an expiration of Quarterly Option Series on the same class. In other words, the total number of consecutive expirations will be five, including any existing monthly or quarterly expirations.[5]

The Exchange notes that the Weeklys Program has been well-received by market participants, in particular by retail investors. The Exchange believes that the current proposed revision to the Weeklys Program will permit the Exchange to meet increased demand from BOX market participants and provide them with the ability to hedge in a greater number of option classes and series.

With regard to the impact of this proposal on system capacity, the Exchange has analyzed its capacity and represents that it and the Options Price Reporting Authority have the necessary systems capacity to handle the potential additional traffic associated with trading of an expanded number of expirations that participate in the Weeklys Program.

In addition, the Exchange is proposing to add new language to IM–5050–6(b) and IM–6090–2(b) to allow the Exchange, in the event that the underlying security has moved such that there are no series that are at least 10% above or below the current price of the underlying security, to delist series with no open interest in both the call and the put series having a: (i) Strike higher than the highest strike price with open interest in the put and/or call series for a given expiration month; and (ii) strike lower than the lowest strike price with open interest in the put and/or the call series for a given expiration month, so as to list series that are at least 10% but not more than 30% above or below the current price of the underlying security. Further, in the event that all existing series have open interest and there are no series at least 10% above or below the current price of the underlying security, the Exchange may list additional series, in excess of the 30 allowed currently under IM–5050–6(b) and IM–6090–2(b) that are at least 10% and not more than 30% above or below the current price of the underlying security. This change is

[20] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange adopted the Weeklys Program on a permanent basis on July 15, 2010. *See* Securities Exchange Act Release No. 62505 (July 15, 2010), 75 FR 42792 (July 22, 2010) (SR–BX–2010–047).

[4] *See* Securities Exchange Act Release No. 65773 (November 17, 2011), 76 FR 72490 (November 23, 2011) (SR–BX–2011–075). *See also,* Exchange IM–5050–6(b)(1) and note that currently, BOX may open Short Term Options Series that expire on the Friday of the following business week.

[5] For example, if quarterly options expire week 1 and monthly options expire week 3 from now, the proposal would allow the following expirations: week 1 quarterly, week 2 STOS, week 3 monthly, week 4 STOS, and week 5 STOS. If quarterly options expire week 3 and monthly options expire week 5, the following expirations would be allowed: week 1 STOS, week 2 STOS, week 3 quarterly, week 4 STOS, and week 5 monthly.

being proposed notwithstanding the current cap of 30 series per class under the Weeklys Program.

The Exchange believes that it is important to allow investors to roll existing option positions. Ensuring that there are always series at least 10% but not more than 30% above or below the current price of the underlying security will allow investors the flexibility they need to roll existing positions.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,[6] in general, and Section 6(b)(5) of the Act,[7] in particular, in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes that expanding the Weeklys Program will result in a continuing benefit to investors by giving them more flexibility to closely tailor their investment decisions and hedging decisions in a greater number of securities.

The Exchange also believes that expanding the Weeklys Program will provide the investing public and other market participants with additional opportunities to hedge their investment thus allowing these investors to better manage their risk exposure. While the expansion of the Weeklys Program will generate additional quote traffic, the Exchange does not believe that this increased traffic will become unmanageable since the proposal remains limited to a fixed number of expirations.

The Exchange believes that the ability to delist series with no open interest in both the call and the put series will benefit investors by devoting the current cap in the number of series to those series that are more closely tailored to the investment decisions and hedging decisions of investors.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In this regard and as indicated above, the Exchange notes that proposal is a competitive filing and believes this proposed rule change is necessary to permit fair competition among the options exchanges.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because the proposal is substantially similar to those of other exchanges that have been approved by the Commission and permit such exchanges to open up to five consecutive expirations under their respective STOS Programs as well as allow for the exchanges to delist any series in the STOS Programs that do not have open interest and expand the number of series per class permitted in the STOS Programs under limited circumstances.[10] Therefore, the Commission designates the proposal operative upon filing.[11]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BOX–2012–020 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BOX–2012–020. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BOX–2012–020 and should be submitted on or before January 2, 2013.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[10] *See* Securities Exchange Act Release Nos. 68190 (November 8, 2012) (SR–NYSEArca–2012–95); 68191 (November 8, 2012) (SR–NYSEMKT–2012–42).

[11] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29856 Filed 12–10–12; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice: 8109]

30-Day Notice of Proposed Information Collection: Application Under the Hague Convention on the Civil Aspects of International Child Abduction

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the information collection described below to the Office of Management and Budget (OMB) for approval. In accordance with the Paperwork Reduction Act of 1995 we are requesting comments on this collection from all interested individuals and organizations. The purpose of this Notice is to allow 30 days for public comment.

DATES: Submit comments directly to the Office of Management and Budget (OMB) up to January 10, 2013.

ADDRESSES: Direct comments to the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). You may submit comments by the following methods:

- *Email: oira_submission@omb.eop.gov.* You must include the DS form number, information collection title, and the OMB control number in the subject line of your message.
- *Fax:* 202–395–5806. Attention: Desk Officer for Department of State.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to Derek A. Rivers, Bureau of Consular Affairs, Overseas Citizens Services (CA/OCS/L), U.S. Department of State, SA–29, 4th Floor, Washington, DC 20520 or at *CA-OCS-L@state.gov.*

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Application Under the Hague Convention on the Civil Aspects of International Child Abduction.
- *OMB Control Number:* 1405–0076.
- *Type of Request:* Extension.
- *Originating Office:* CA/OCS/L.
- *Form Number:* DS–3013, 3013–s.
- *Respondents:* Person seeking return of or access to child.
- *Estimated Number of Respondents:* 300.
- *Estimated Number of Responses:* 300.
- *Average Time per Response:* 1 hour.
- *Total Estimated Burden Time:* 300 hours.
- *Frequency:* On Occasion.
- *Obligation To Respond:* Voluntary.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of proposed collection: The Application Under the Hague Convention on the Civil Aspects of International Child Abduction (DS–3013 and DS 3013–s) is used by parents or legal guardians who are asking the State Department's assistance in seeking the return of, or access to, a child or children alleged to have been wrongfully removed from or retained outside of the child's habitual residence and currently located in another country that is also party to the Hague Convention on the Civil Aspects of International Child Abduction. The application requests information regarding the identities of the applicant, the child or children, and the person alleged to have wrongfully removed or retained the child or children. In addition, the application requires that the applicant provide the circumstances of the alleged wrongful removal or retention and the legal justification for the request for return or access. The State Department, as the U.S. Central Authority, uses this information to establish, if possible, the applicants' claims under the Convention; to advise applicants about available remedies under the Convention; and to provide the information necessary to the foreign Central Authority in its efforts to locate the child or children, and to facilitate return of or access to the child or children pursuant to the Convention. 42 U.S.C. 11608 is one of the main legal authorities that permit the Department to use this form.

Methodology: The completed form DS–3013 and DS 3013–s may be submitted to the Office of Children's Issues by mail, by fax, or electronically accessed through *www.travel.state.gov.*

Dated: November 16, 2012.

Michelle Bernier-Toth,

Managing Director, Bureau of Consular Affairs, Overseas Citizen Services, Department of State.

[FR Doc. 2012–29867 Filed 12–10–12; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 8108]

Culturally Significant Objects Imported for Exhibition Determinations: ''Masterpieces of the Joseon Dynasty From the National Museum of Korea''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''Masterpieces of the Joseon Dynasty from the National Museum of Korea,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at The Los Angeles County Museum of Art in Los Angeles, California in two rotations from on or about January 24, 2013 until on or about July 28, 2013, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Ona M. Hahs, Attorney-Adviser, Office of the

[12] 17 CFR 200.30–3(a)(12).

Legal Adviser, U.S. Department of State (telephone: 202–632–6473). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: December 3, 2012.

J. Adam Ereli,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2012–29736 Filed 12–10–12; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 8104]

In the Matter of Amendment of the Designation of al-Qa'ida in Iraq, aka Jam'at al Tawhid wa'al-Jihad, aka The Monotheism and Jihad Group, aka The al-Zarqawi Network, aka al-Tawhid, aka Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn, aka The Organization of al-Jihad's Base of Operations in Iraq, aka al-Qaida of Jihad in Iraq, aka al-Qaida in Iraq, aka al-Qaida in Mesopotamia, aka al-Qaida in the Land of the Two Rivers, aka al-Qaida of the Jihad in the Land of the Two Rivers, aka al-Qaida of Jihad Organization in the Land of the Two Rivers, aka al-Qaida Group of Jihad in Iraq, aka al-Qaida Group of Jihad in the Land of the Two Rivers, aka The Organization of Jihad's Base in the Country of the Two Rivers, aka The Organization Base of Jihad/Country of the Two Rivers, aka The Organization of al-Jihad's Base in the Land of the Two Rivers, aka The Organization Base of Jihad/Mesopotamia, aka The Organization of al-Jihad's Base of Operations in the Land of the Two Rivers, aka Tanzeem qa'idat al Jihad/Bildad al Raafidaini, as a Foreign Terrorist Organization pursuant to Section 219 of the Immigration and Nationality Act; To include the aliases Al-Nusrah Front, Jabhat al-Nusrah, Jabhet al-Nusra, The Victory Front, Al Nusrah Front for the People of the Levant

Based upon a review of the Administrative Record assembled in this matter pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) (''INA''), and in consultation with the Attorney General and the Secretary of the Treasury, the Secretary of State concludes that there is a sufficient factual basis to find that al-Qa'ida in Iraq, also known under the aliases listed above, uses or has used additional aliases, namely, al-Nusrah Front, aka Jabhat al-Nusrah, aka Jabhet al-Nusra, aka The Victory Front, aka Al Nusrah Front for the People of the Levant.

Therefore, pursuant to § 219(b) of the INA (8 U.S.C. 1189(b)), the Secretary of State hereby amends the 2004 designation of al-Qa'ida in Iraq as a foreign terrorist organization, to include the following new alias and other possible transliterations thereof: Al-Nusrah Front, Jabhat al-Nusrah, Jabhet al-Nusra, The Victory Front, Al Nusrah Front for the People of the Levant.

Dated: November 20, 2012.

Hillary Rodham Clinton,

Secretary of State.

[FR Doc. 2012–29870 Filed 12–10–12; 8:45 am]

BILLING CODE 4710–10–P

DEPARTMENT OF STATE

[Public Notice 8105]

In the Matter of the Amendment of the Designation of al-Qa'ida in Iraq, aka Jam'at al Tawhid wa'al-Jihad, aka The Monotheism and Jihad Group, aka The al-Zarqawi Network, aka al-Tawhid, aka Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn, aka The Organization of al-Jihad's Base of Operations in Iraq, aka al-Qaida of Jihad in Iraq, aka al-Qaida in Iraq, aka al-Qaida in Mesopotamia, aka al-Qaida in the Land of the Two Rivers, aka al-Qaida of the Jihad in the Land of the Two Rivers, aka al-Qaida of Jihad Organization in the Land of the Two Rivers, aka al-Qaida Group of Jihad in Iraq, aka al-Qaida Group of Jihad in the Land of the Two Rivers, aka The Organization of Jihad's Base in the Country of the Two Rivers, aka The Organization Base of Jihad/Country of the Two Rivers, aka The Organization of al-Jihad's Base in the Land of the Two Rivers, aka The Organization Base of Jihad/Mesopotamia, aka The Organization of al-Jihad's Base of Operations in the Land of the Two Rivers, aka Tanzeem qa'idat al Jihad/Bildad al Raafidaini, as a Specially Designated Global Terrorist entity pursuant to Executive Order 13224; To include the aliases Al-Nusrah Front, Jabhat al-Nusrah, Jabhet al-Nusra, The Victory Front, Al Nusrah Front for the People of the Levant

Based upon a review of the Administrative Record assembled in this matter pursuant to Executive Order 13224 and in consultation with the Attorney General, the Secretary of Homeland Security, and the Secretary of the Treasury, the Secretary of State concludes that there is a sufficient factual basis to find that al-Qa'ida in Iraq, also known under the aliases listed above, uses or has used additional aliases, namely, al-Nusrah Front, aka Jabhat al-Nusrah, aka Jabhet al-Nusra, aka The Victory Front, aka Al Nusrah Front for the People of the Levant.

Therefore, the Secretary of State hereby amends the 2004 designation of al-Qa'ida in Iraq as a Specially Designated Global Terrorist entity, pursuant to Executive Order 13224, to include the following new alias and other possible transliterations thereof: Al-Nusrah Front, Jabhat al-Nusrah, Jabhet al-Nusra, The Victory Front, Al Nusrah Front for the People of the Levant.

Dated: November 20, 2012.

Hillary Rodham Clinton,

Secretary of State.

[FR Doc. 2012–29868 Filed 12–10–12; 8:45 am]

BILLING CODE 4710–10–P

TRADE REPRESENTATIVE

[Dispute No. WTO/DS449]

WTO Dispute Settlement Proceeding Regarding United States ; Countervailing and Anti-Dumping Measures on Certain Products From China

AGENCY: Office of the United States Trade Representative.

ACTION: Notice; request for comments.

SUMMARY: The Office of the United States Trade Representative (''USTR'') is providing notice that on November 19, 2012, the People's Republic of China (''China'') requested the establishment of a dispute settlement panel with the United States under the *Marrakesh Agreement Establishing the World Trade Organization* (''WTO Agreement'') concerning Public Law 112–99, ''An act to apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries, and for other purposes'' (''Pub. L. 112–99''), and the countervailing and anti-dumping duty determinations and actions by the Department of Commerce, the U.S. International Trade Commission and the U.S. Customs and Border Protection on imports of the products from China listed below. The panel request may be found at www.wto.org contained in a document designated as WT/DS449/2. USTR invites written comments from the public concerning the issues raised in this dispute.

DATES: Although USTR will accept any comments received during the course of the dispute settlement proceedings, comments should be submitted on or before *December 30, 2012,* to be assured of timely consideration by USTR.

ADDRESSES: Public comments should be submitted electronically to *www.regulations.gov,* docket number USTR–2012–0031. If you are unable to provide submissions at *www.regulations.gov,* please contact Sandy McKinzy at (202) 395–9483 to arrange for an alternative method of transmission. If (as explained below) the comment contains confidential information, then the comment should be submitted by fax only to Sandy McKinzy at (202) 395–3640.

FOR FURTHER INFORMATION CONTACT: Joseph Rieras, Assistant General Counsel, Office of the United States Trade Representative; or Lisa Wang, Assistant General Counsel, Office of the United States Trade Representative. Contact information is: 600 17th Street NW., Washington, DC 20508, (202) 395–3150.

SUPPLEMENTARY INFORMATION: Section 127(b)(1) of the Uruguay Round Agreements Act (''URAA'') (19 U.S.C. 3537(b)(1)) requires that notice and opportunity for comment be provided after the United States submits or receives a request for the establishment of a WTO dispute settlement panel. Consistent with this obligation, USTR is providing notice that China has requested a panel pursuant to the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (''DSU''). Once it is established, the panel will hold its meetings in Geneva, Switzerland, and would be expected to issue a report on its findings and recommendations within nine months after it is established.

Major Issues Raised by China

On November 19, 2012, China requested the establishment of a panel concerning Public Law 112–99, ''An act to apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries, and for other purposes'' (''Pub. L. 112–99''), and the concurrent application of anti-dumping and countervailing duties under the nonmarket economy methodology with respect to the following investigations and reviews initiated between November 20, 2006 and March 13, 2012 on the following imports from China: Coated Free Sheet Paper (C–570–907); Circular Welded Carbon Quality Steel Pipe (C–570–911); Light-Walled Rectangular Pipe and Tube (C–570–915); Laminated Woven Sacks (C–570–917); Certain New Pneumatic Off-The-Road Tires; (C–570–913); Certain New Pneumatic Off-The-Road Tires, Administrative Review (C–570–913); Raw Flexible Magnets (C–570–923); Lightweight Thermal Paper (C–570–921); Sodium Nitrite (C–570–926); Circular Welded Austenitic Stainless Pressure Pipe (C–570–931); Certain Circular Welded Carbon Quality Steel Line Pipe (C–570–936); Citric Acid and Certain Citrate Salts (C–570–938); Citric Acid and Certain Citrate Salts, Administrative Review (C–570–938); Certain Tow Behind Lawn Groomers and Certain Parts Thereof (C–570–940); Certain Kitchen Appliance Shelving and Racks (C–570–942); Certain Kitchen Appliance Shelving and Racks, Administrative Review (C–570–942), Certain Oil Country Tubular Goods (C–570–944), Prestressed Concrete Steel Wire Strand (C–570–946); Certain Steel Grating (C–570–948); Wire Decking (C–570–950); Narrow Woven Ribbons With Woven Selvedge (C–570–953); Certain Magnesia Carbon Bricks (C–570–955); Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe (C–570–957); Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses (C–570–959); Certain Potassium Phosphate Salts (C–570–963); Drill Pipe (C–570–966); Aluminum Extrusions (C–570–968); Multilayered Wood Flooring (C–570–971); Certain Steel Wheels (C–570–974); Galvanized Steel Wire (C–570–976); High Pressure Steel Cylinders (C–570–978); Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, (C–570–980); Utility Scale Wind Towers (C–570–982); Drawn Stainless Steel Sinks (C–570–984); Coated Free Sheet Paper (A–570–906); Circular Welded Carbon Quality Steel Pipe (A–570–910); Light-Walled Rectangular Pipe and Tube (A–570–916); Laminated Woven Sacks (A–570–914); Certain New Pneumatic Off-The-Road Tires (A–570–912); Certain New Pneumatic Off-The-Road Tires, Administrative Review (A–570–912); Raw Flexible Magnets (A–570–922); Lightweight Thermal Paper (A–570–920); Sodium Nitrite (A–570–925); Circular Welded Austenitic Stainless Pressure Pipe (A–570–930); Certain Circular Welded Carbon Quality Steel Line Pipe (A–570–935); Citric Acid and Certain Citrate Salts (A–570–937); Citric Acid and Certain Citrate Salts, Administrative Review (A–570–937); Certain Tow Behind Lawn Groomers and Certain Parts Thereof (A–570–939); Certain Kitchen Appliance Shelving and Racks (A–570–941); Certain Kitchen Appliance Shelving and Racks, Administrative Review (A–570–941); Certain Oil Country Tubular Goods (A–570–943); Prestressed Concrete Steel Wire Strand (A–570–945); Certain Steel Grating (A–570–947); Wire Decking (A–570–949); Narrow Woven Ribbons With Woven Selvedge (A–570–952); Certain Magnesia Carbon Bricks (A–570–954); Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe (A–570–956); Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses (A–570–958); Certain Potassium Phosphate Salts (A–570–962); Drill Pipe (A–570–965); Aluminum Extrusions (A–570–967); Multilayered Wood Flooring (A–570–970); Certain Steel Wheels (A–570–973); Galvanized Steel Wire (A–570–975); High Pressure Steel Cylinders (A–570–977); Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules (A–570–979); Utility Scale Wind Towers (A–570–981); and Drawn Stainless Steel Sinks (A–570–983). China alleges that the United States acted inconsistently with Articles VI, X:1, X:2, X:3 of the *General Agreement on Tariffs and Trade 1994* (''GATT 1994''), Articles 10, 15, 19, 21 and 32 of the *Agreement on Subsidies and Countervailing Measures* (''SCM Agreement''), and Articles 9 and 11 of the *Agreement on Implementation of Article VI of the GATT 1994* (''AD Agreement''). The challenged investigations and reviews are available at the following Web page of the Department of Commerce: *http://ia.ita.doc.gov/frn/index.html.*

The panel request was largely similar to the consultations request filed on September 17, 2012.

Public Comment: Requirements for Submissions

Interested persons are invited to submit written comments concerning the issues raised in this dispute. Persons may submit public comments electronically to *www.regulations.gov* docket number USTR–2012–0031. If you are unable to provide submissions at *www.regulations.gov,* please contact Sandy McKinzy at (202) 395–9483 to arrange for an alternative method of transmission.

To submit comments via *www.regulations.gov,* enter docket number USTR–2012–0031 on the home page and click ''search''. The site will provide a search-results page listing all documents associated with this docket. Find a reference to this notice by selecting ''Notice'' under ''Document Type'' on the left side of the search-results page, and click on the link entitled ''Comment Now!.'' (For further information on using the *www.regulations.gov* Web site, please consult the resources provided on the Web site by clicking on ''How to Use Regulations.gov Site'' on the bottom of the page.)

The *www.regulations.gov* site provides the option of providing comments by filling in a ''Type Comments'' field, or by attaching a document using an ''Upload File'' field. It is expected that most comments will be provided in an attached document. If a document is attached, it is sufficient to type ''See attached'' in the ''Type Comments'' field.

A person requesting that information contained in a comment submitted by that person be treated as confidential business information must certify that such information is business confidential and would not customarily be released to the public by the submitter. Confidential business information must be clearly designated as such and the submission must be marked ''BUSINESS CONFIDENTIAL'' at the top and bottom of the cover page and each succeeding page. Any comment containing business confidential information must be submitted by fax to Sandy McKinzy at (202) 395–3640. A non-confidential summary of the confidential information must be submitted to *www.regulations.gov.* The non-confidential summary will be placed in the docket and open to public inspection.

Information or advice contained in a comment submitted, other than business confidential information, may be determined by USTR to be confidential in accordance with section 135(g)(2) of the Trade Act of 1974 (19 U.S.C. 2155(g)(2)). If the submitter believes that information or advice may qualify as such, the submitter—

(1) Must clearly so designate the information or advice;

(2) Must clearly mark the material as ''SUBMITTED IN CONFIDENCE'' at the top and bottom of the cover page and each succeeding page; and

(3) Must provide a non-confidential summary of the information or advice.

Any comment containing confidential information must be submitted by fax. A non-confidential summary of the confidential information must be submitted to *www.regulations.gov.* The non-confidential summary will be placed in the docket and open to public inspection.

Pursuant to section 127(e) of the Uruguay Round Agreements Act (19 U.S.C. 3537(e)), USTR will maintain a docket on this dispute settlement proceeding accessible to the public at *www.regulations.gov*, docket number USTR–2012–0031. The public file will include non-confidential comments received by USTR from the public with respect to the dispute. If a dispute settlement panel is convened or in the event of an appeal from such a panel, the U.S. submissions, any non-confidential submissions, or non-confidential summaries of submissions, received from other participants in the dispute, will be made available to the public on USTR's Web site at *www.ustr.gov,* and the report of the panel, and, if applicable, the report of the Appellate Body, will be available on the Web site of the World Trade Organization, *www.wto.org.*

Comments open to public inspection may be viewed on the *www.regulations.gov* Web site.

Juan Millan,

Acting Assistant United States Trade Representative for Monitoring and Enforcement.

[FR Doc. 2012–29872 Filed 12–10–12; 8:45 am]

BILLING CODE 3290–F3–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2000–7257; Notice No. 72]

Railroad Safety Advisory Committee; Notice of Meeting

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Announcement of Railroad Safety Advisory Committee (RSAC) meeting.

SUMMARY: FRA announces the forty-eighth meeting of the RSAC, a Federal Advisory Committee that develops railroad safety regulations through a consensus process. The RSAC meeting topics will include opening remarks from the FRA Administrator and status reports will be provided by the Fatigue Management, Rail Failure, and Risk Reduction Working Groups. Status reports will also be provided by the Engineering and System Safety Task Forces. This agenda is subject to change, including the possible addition of further proposed tasks under the Rail Safety Improvement Act of 2008 (RSIA).

DATES: The RSAC meeting is scheduled to commence at 9:30 a.m. on Wednesday, January 9, 2013, and will adjourn by 4:30 p.m.

ADDRESSES: The RSAC meeting will be held at the National Housing Center, located at 1201 15th Street NW., Washington, DC. The meeting is open to the public on a first-come, first-served basis, and is accessible to individuals with disabilities. Sign and oral interpretation can be made available if requested 10 calendar days before the meeting.

FOR FURTHER INFORMATION CONTACT: Larry Woolverton, RSAC Administrative Officer/Coordinator, FRA, 1200 New Jersey Avenue SE., Mailstop 25, Washington, DC 20590, (202) 493–6212; or Robert Lauby, Deputy Associate Administrator for Regulatory and Legislative Operations, FRA, 1200 New Jersey Avenue SE., Mailstop 25, Washington, DC 20590, (202) 493–6474.

SUPPLEMENTARY INFORMATION: Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), FRA is giving notice of a meeting of the RSAC. The RSAC was established to provide advice and recommendations to FRA on railroad safety matters. The RSAC is composed of 54 voting representatives from 32 member organizations, representing various rail industry perspectives. In addition, there are non-voting advisory representatives from the agencies with railroad safety regulatory responsibility in Canada and Mexico, the National Transportation Safety Board, and the Federal Transit Administration. The diversity of the Committee ensures the requisite range of views and expertise necessary to discharge its responsibilities. See the RSAC Web site for details on prior RSAC activities and pending tasks at: *http://rsac.fra.dot.gov/.* Please refer to the notice published in the **Federal Register** on March 11, 1996 (61 FR 9740), for additional information about the RSAC.

Issued in Washington, DC, on December 5, 2012.

Robert C. Lauby,

Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2012–29835 Filed 12–10–12; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2011–0027; Notice No. 5]

Northeast Corridor Safety Committee; Notice of Meeting

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Announcement of a Northeast Corridor Safety Committee (NECSC) meeting.

SUMMARY: FRA announces the third meeting of the NECSC, a Federal Advisory Committee mandated by Section 212 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA). The Committee is made up of stakeholders operating on the

Northeast Corridor (NEC), and the purpose of the Committee is to provide annual recommendations to the Secretary of Transportation. The NECSC meeting topics will include: Status of the frequency spectrum recommendation to the Secretary of Transportation, impacts of Hurricane Sandy on NEC infrastructure and lessons learned, and a general discussion of safety issues.

DATES: The NECSC meeting is scheduled to commence at 9 a.m. on Wednesday, January 30, 2013, and will adjourn by 4:30 p.m.

ADDRESSES: The NECSC meeting will be held at the Sonesta Hotel (formerly Crown Plaza Philadelphia Downtown), 1800 Market Street, Philadelphia, PA 19103. The meeting is open to the public on a first-come, first-served basis, and is accessible to individuals with disabilities. Sign and oral interpretation can be made available if requested 10 calendar days before the meeting.

FOR FURTHER INFORMATION CONTACT: Mr. Larry Woolverton, NECSC Administrative Officer/Coordinator, FRA, 1200 New Jersey Avenue SE., Mailstop 25, Washington, DC 20590, (202) 493–6212; or Jo Strang, Associate Administrator for Railroad Safety/Chief Safety Officer, FRA, 1200 New Jersey Avenue SE., Mailstop 25, Washington, DC 20590, (202) 493–6300.

SUPPLEMENTARY INFORMATION: The NECSC is mandated by a statutory provision in Section 212 of the PRIIA (codified at 49 U.S.C. 24905(f)). The Committee is chartered by the Secretary of Transportation and is an official Federal Advisory Committee established in accordance with the provisions of the Federal Advisory Committee Act, as amended (codified at 5 U.S.C. Title 5—Appendix).

Issued in Washington, DC, on December 5, 2012.

Jo Strang,

Associate Administrator for Railroad Safety/Chief Safety Officer.

[FR Doc. 2012–29834 Filed 12–10–12; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2012–0109]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel SOUTHERN CROSS III; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before January 10, 2013.

ADDRESSES: Comments should refer to docket number MARAD–2012–0109. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov*. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Linda Williams, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–0903, Email *Linda.Williams@dot.gov*.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel SOUTHERN CROSS III is:

Intended Commercial Use of Vessel: ''Coastwise passenger trade, namely coastal sightseeing cruises for up to 6 passengers, as an uninspected passenger vessel.''

Geographic Region: ''Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, Florida.''

The complete application is given in DOT docket MARAD–2012–0109 at *http://www.regulations.gov*. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: December 4, 2012.

Julie P. Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2012–29755 Filed 12–10–12; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2012–0108]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel PREDATOR II; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before January 10, 2013.

ADDRESSES: Comments should refer to docket number MARAD–2012–0108. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140,

1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Linda Williams, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–0903, Email *Linda.Williams@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel PREDATOR II is:

Intended Commercial Use of Vessel: 6 pack private charters.

Geographic Region: Florida.

The complete application is given in DOT docket MARAD–2012–0108 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: December 4, 2012.

Julie P. Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2012–29756 Filed 12–10–12; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[U.S. DOT Docket No. NHTSA–2012–0169]

Reports, Forms, and Recordkeeping Requirements: Agency Information Collection Activity Under OMB Review

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Request for public comment on proposed collection of information.

SUMMARY: Before a Federal agency can collect certain information from the public, it must receive approval from the Office of Management and Budget (OMB). Under procedures established by the Paperwork Reduction Act of 1995, before seeking OMB approval, Federal agencies must solicit public comment on proposed collections of information, including extensions and reinstatements of previously approved collections. This document describes one collection of information for which NHTSA intends to seek OMB approval.

DATES: Comments must be received on or before February 11, 2013.

ADDRESSES: Refer to the docket notice number cited at the beginning of this notice and send your comments by any of the following methods:

Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.

Fax: 202–493–2251.

Mail: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Ave. SE., Washington, DC 20590.

Hand Delivery: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Ave. SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Jonathan Walker, contract task order manager, Office of Regulatory Analysis and Evaluation, National Highway Traffic Safety Administration, 1200 New Jersey Ave. SE., NVS–432, Washington, DC 20590. Mr. Walker's phone number is 202–366–8571 and his email address is *jonathan.walker@dot.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995, before an agency submits a proposed collection of information to OMB for approval, it must publish a document in the **Federal Register** providing a 60-day comment period and otherwise consult with members of the public and affected agencies concerning each proposed collection of information. The OMB has promulgated regulations describing what must be included in such a document. Under OMB's regulations (at 5 CFR 1320.8(d)), an agency must ask for public comment on the following: (i) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (ii) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) How to enhance the quality, utility, and clarity of the information to be collected; and (iv) How to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses. In compliance with these requirements, NHTSA asks public comment on the following proposed collection of information:

Title: Tire Pressure Monitoring Systems Special Studies.

Type of Request: Renewal.

OMB Clearance Number: 2127–0626.

Form Number: This collection of information uses no standard forms.

Required Expiration Date of Approval: June 30, 2016.

Abstract

The National Highway Traffic Safety Administration (NHTSA) is an agency within the U.S. Department of Transportation. NHTSA has issued Corporate Average Fuel Economy (CAFE) standards for light vehicles since 1978 under the statutory authority of the Energy Policy and Conservation Act (EPCA). The Energy Independence and Security Act (EISA), enacted on December 19, 2007, amended EPCA and mandated that NHTSA, in consultation with EPA, set fuel economy standards for medium and heavy-duty (MD/HD) on-highway vehicles and work trucks to the maximum feasible level in each model year, providing four full model years of regulatory lead-time. 49 U.S.C. 32902 requires the agency to implement test methods, measurement metrics, fuel economy standards, and compliance and enforcement protocols that are

appropriate, cost-effective, and technologically feasible for the various vehicle classes.

The first MD/HD fuel consumption standards, covering model year 2014–2018 vehicles, built on many years of engine and vehicle technology development to achieve what the agency believes is the greatest degree of fuel consumption reduction consistent with principles of technological and economic feasibility. In addition to taking aggressive steps that are reasonably possible now, the agency is committed to continue learning about this complex sector to further reduce fuel consumption through future regulatory steps. This special study is aligned with this commitment, by improving NHTSA's understanding of three operational characteristics related to MD/HD trucks that impact the estimation of regulatory costs and benefits for the next phase of MD/HD fuel economy rulemaking covering model years 2019 and beyond.

The first topic for which this special study seeks to gather data is known as the ''fuel economy rebound effect.'' As the operating cost per mile driven decreases due to improved vehicle fuel economy, a ''rebound effect'' may occur (*i.e.,* demand for trucking operations may increase, resulting in increased vehicle miles traveled (VMT) across MD/HD fleets). The magnitude of this effect is a subject of uncertainty; therefore, a survey to gather data on the relationship between VMT and operating cost per mile will help to refine estimates of the rebound effect.

This special study also seeks to gather data to profile the characteristics of MD/HD vehicle refueling trips, in effort to estimate the value of time saved at the pump due to improvements in fuel economy. With the 2017–2025 MY light-duty vehicle CAFE rule, NHTSA utilized survey data gathered at refueling stations to quantify this regulatory impact; however, no analogous data exist for MD/HD vehicles.

NHTSA also seeks to estimate the value of time savings that may result from the implementation of active tire pressure monitoring systems in MD/HD vehicles, as these systems are among the fuel-economy-improving technologies under evaluation for future standards. To properly estimate this value, data are needed on the frequency with which maintenance staff or vehicle operators check tire pressures and how many minutes a tire pressure check and adjustment takes.

Description of the Likely Respondents (Including Estimated Number, and Proposed Frequency of Response to the Collection of Information): A list of MD/HD truck fleet operators will be developed and a sub-set of these operators will be contacted for initial pre-screening to determine survey eligibility. To be deemed eligible for inclusion, fleet operators must operate MD/HD fleets consisting of one or more vehicle classes ranging from class 2b through class 8. The sample will include sufficient diversity to gather data on all class 2b through class 8 MD/HD vehicles. Respondents will include management or other administrative staff with knowledge of macro-level fleet data and operational policies.

100 or more responding sample units are sought. To achieve this target, it is estimated that the initial sample be comprised of 200 MD/HD truck fleet operators, allowing for a response rate minimum of 50 percent. The universe under study includes the entirety of MD/HD truck fleet operators.

Separately, a list of between 20 and 30 refueling locations will be developed, identifying those areas at which to survey MD/HD truck drivers to gather additional data regarding refueling and tire pressure maintenance activities. Collection of up to 4,000 successful responses is desired, from a universe comprised of all Class 2b through Class 8 truck drivers, and sufficient overall sample diversity must be present to gather data on all MD/HD classes. Allowing for a 50 percent response rate, up to 8,000 interview attempts may be required.

There will be separate survey instruments for fleet operators and for vehicle drivers. These survey instruments will target fleet operators or vehicle drivers as appropriate with questions intended to gather data on the following topics:

(1) Data to facilitate analysis of MD/HD truck fuel economy rebound effect.

(2) Data to facilitate analysis of MD/HD truck refueling practices.

(3) Data regarding the maintenance of cab and trailer tire pressures.

The survey of vehicle drivers will utilize in-person interviews as the sole method of data collection. The survey of fleet operators will involve telephone interviews, web-based forms, and—if necessary to meet response rate objectives—hard copy forms.

Estimate of the Total Annual Reporting and Recordkeeping Burden Resulting From the Collection of Information: NHTSA estimates that the average length of time to complete the fleet operator survey will be 30 minutes per respondent for a successful response (equivalent to a total of 100 hours in the event that the full sample responds), plus an additional 10 minutes each (or a total of approximately 33 hours) for the initial pre-screening to determine respondent eligibility. Consequently, the total fleet operator respondent burden is estimated to be 133 hours.

The on-site interview-based portion of this survey, to be conducted of MD/HD truck drivers at refueling locations, is expected to require 10 minutes of respondent time per successful response, plus 2 minutes per refusal. Assuming 4,000 successful collections and 4,000 refusals, this equates to 800 hours of respondent burden borne by MD/HD truck drivers.

Authority: 44 U.S.C. Section 3506(c)(2)(A).

James F. Simons,

Director, Office of Regulatory Analysis and Evaluation.

[FR Doc. 2012–29844 Filed 12–10–12; 8:45 am]

BILLING CODE 4910–59–P

FEDERAL REGISTER

Vol. 77 Tuesday,
No. 238 December 11, 2012

Part II

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Lost River Sucker and Shortnose Sucker; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2011–0097; 4500030114]

RIN 1018–AX41

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Lost River Sucker and Shortnose Sucker

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, designate critical habitat for the Lost River sucker and shortnose sucker under the Endangered Species Act. In total, approximately 146 miles (234 kilometers) of streams and 117,848 acres (47,691 hectares) of lakes and reservoirs for Lost River sucker and approximately 136 miles (219 kilometers) of streams and 123,590 acres (50,015 hectares) of lakes and reservoirs for shortnose sucker in Klamath and Lake Counties, Oregon, and Modoc County, California, fall within the boundaries of the critical habitat designation. The effect of this regulation is to conserve Lost River sucker's and shortnose sucker's habitat under the Endangered Species Act.

DATES: This rule becomes effective on January 10, 2013.

ADDRESSES: This final rule is available on the Internet at *http://www.regulations.gov.* Comments and materials received, as well as supporting documentation used in preparing this final rule, are available for public inspection, by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Klamath Falls Fish and Wildlife Office, 1936 California Avenue Klamath Falls, OR 97601; telephone 541–885–8481; facsimile 541–885–7837.

The coordinates or plot points or both from which the maps are generated are included in the administrative record for this critical habitat designation and are available at *http://www.fws.gov/klamathfallsfwo,* at *http://www.regulations.gov* in Docket No. FWS–R8–ES–2011–0097, and at the Klamath Falls Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). Any additional tools or supporting information that we may develop for this critical habitat designation will also be available at the Fish and Wildlife Service Web site and Field Office set out above, and may also be included in the preamble and/or at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Laurie R. Sada, Field Supervisor, U.S. Fish and Wildlife Service, Klamath Falls Fish and Wildlife Office, telephone 541–885–8481; facsimile 541–885–7837. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. This is a final rule to designate critical habitat for the Lost River sucker and shortnose sucker. Under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act), any species that is determined to be an endangered or threatened species requires critical habitat to be designated, to the maximum extent prudent and determinable. Designations and revisions of critical habitat can only be completed by issuing a rule.

We, the U.S. Fish and Wildlife Service (Service), listed these two species as endangered on July 18, 1988 (53 FR 27130). On December 1, 1994, we published in the **Federal Register** a proposed critical habitat designation for Lost River sucker and shortnose sucker (59 FR 61744); that proposal was never finalized. On December 7, 2011, we published a revised proposed critical habitat designation in the **Federal Register** (76 FR 76337). Section 4(b)(2) of the Act states that the Secretary shall designate critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat.

The critical habitat areas we are designating in this rule constitute our current best assessment of the areas that meet the definition of critical habitat for Lost River sucker and shortnose sucker. We are designating:

- Approximately 146 miles (mi) (234 kilometers (km)) of streams and 117,848 acres (ac) (47,691 hectares (ha)) of lakes and reservoirs for Lost River sucker.
- Approximately 136 mi (219 km) of streams and 123,590 ac (50,015 ha) of lakes and reservoirs for shortnose sucker.

We have prepared an economic analysis of the designation of critical habitat. In order to consider economic impacts, we have prepared an analysis of the economic impacts of the critical habitat designations and related factors. We announced the availability of the draft economic analysis (DEA) in the **Federal Register** on July 26, 2012 (77 FR 43796), allowing the public to provide comments on our analysis. We have incorporated the comments and have completed the final economic analysis (FEA) concurrently with this final determination.

Peer review and public comment. We sought comments from independent specialists to ensure that our designation is based on scientifically sound data and analyses. We obtained opinions from two knowledgeable individuals with scientific expertise to review our technical assumptions, analysis, and whether or not we had used the best available information. These peer reviewers generally concurred with our methods and conclusions and provided additional information, clarifications, and suggestions to improve this final rule. Information we received from peer review is incorporated in this final revised designation. We also considered all comments and information received from the public during the comment period.

Background

It is our intent to discuss in this final rule only those topics directly relevant to the development and designation of critical habitat for the Lost River sucker and shortnose sucker under the Act. For more information on the biology and ecology of the Lost River sucker and shortnose sucker, refer to the final listing rule published in the **Federal Register** on July 18, 1988 (53 FR 27130), and to the Draft Revised Recovery Plan for the Lost River Sucker and Shortnose Sucker (Service 2011), which is available from the Klamath Falls Fish and Wildlife Office (see **ADDRESSES** section). For information on Lost River sucker and shortnose sucker critical habitat, refer to the proposed rule to designate critical habitat for the Lost River sucker and shortnose sucker published in the **Federal Register** on December 7, 2011 (76 FR 76337). Information on the associated draft economic analysis for the proposed rule to designate revised critical habitat was published in the **Federal Register** on July 26, 2012 (77 FR 43796).

Previous Federal Actions

The Lost River sucker and shortnose sucker were listed as endangered on July 18, 1988 (53 FR 27130). A recovery plan for Lost River sucker and shortnose sucker was finalized on March 17, 1993 (Service 1993). Five-year reviews for the Lost River sucker and shortnose sucker were completed on July 19, 2007 (73 FR 11945; March 5, 2008). We have collected a considerable amount of

scientific information since we issued the 1993 recovery plan, and we issued an updated Draft Revised Recovery Plan for the Lost River Sucker and Shortnose Sucker in 2011 (Service 2011).

On September 9, 1991, the Service received a 60-day notice of intent to sue from the Oregon Natural Resources Council (ONRC) for failure to prepare a recovery plan and to designate critical habitat for the Lost River sucker and shortnose sucker. On November 12, 1991, ONRC filed suit in Federal Court (*Wendell Wood et al.* v. *Marvin Plenert, et al.* (Case No. 91–06496–TC (D. Or.))). The Service entered into a settlement agreement and agreed to complete a final recovery plan by March 1, 1993, and a proposal to designate critical habitat on or before March 10, 1994, and publish a final critical habitat rule by November 29, 1994.

On December 1, 1994, we published proposed critical habitat for Lost River sucker and shortnose sucker (59 FR 61744); that proposal was never finalized. The ONRC (now known as Oregon Wild) recently contacted the Department of Justice and requested that we issue a final critical habitat rule within a reasonable amount of time. On May 10, 2010, a settlement agreement was reached that stipulated the Service submit a final rule designating critical habitat for the Lost River sucker and the shortnose sucker to the **Federal Register** no later than November 30, 2012 (*Wood et al.* v. *Thorson et al.,* No. 91–cv–6496–TC (D. Or.)). As per the settlement agreement, a revised proposed critical habitat rule was published in the **Federal Register** on December 7, 2011 (76 FR 76337). The notice of availability for the draft economic analysis accompanying this rule was published in the **Federal Register** on July 26, 2012 (77 FR 43796).

Summary of Comments and Recommendations

We requested written comments from the public on the proposed designation of critical habitat for the Lost River sucker and shortnose sucker during two comment periods. The first comment period associated with the publication of the proposed rule (76 FR 76337) opened on December 7, 2011, and closed on February 6, 2012. We also requested comments on the proposed critical habitat designation and associated draft economic analysis during a comment period that opened July 26, 2012, and closed on August 27, 2012 (77 FR 43796). We did not receive any requests for a public hearing. We also contacted appropriate Federal, State, and local agencies; scientific organizations; and other interested parties and invited them to comment on the proposed rule and draft economic analysis during these comment periods.

During the first comment period, we received 15 comment letters directly addressing the proposed critical habitat designation. During the second comment period, we received three comment letters addressing the proposed critical habitat designation or the draft economic analysis. All substantive information provided during comment periods has either been incorporated directly into this final determination or addressed below. Comments received were grouped into general issues specifically relating to the proposed critical habitat designation for Lost River sucker and shortnose sucker, and are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from three knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. We received responses from two of the peer reviewers.

We reviewed all comments received from the peer reviewers for substantive issues and new information regarding critical habitat for the Lost River sucker and shortnose sucker. The peer reviewers generally concurred with our methods and conclusions and provided additional information, clarifications, and suggestions to improve the final critical habitat rule. Peer reviewer comments are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Reviewer Comments

(1) Comment: One peer reviewer stated that the Service should consider riparian and wetland habitats along river corridors as cover for rearing in the Cover or Shelter section.

Our Response: We agree with the peer review comment and have included these areas in the *Cover or Shelter* section of this rule.

(2) *Comment:* One peer reviewer questioned our use of the term ''small group'' and thought the term is subjective and does not provide an accurate description of the Lost River sucker population that spawns at Upper Klamath Lake shoreline areas. The peer reviewer stated that the subpopulation of Lost River suckers in the Upper Klamath Lake consists of at least several thousand individuals and could very well be greater in number than the entire number of adult Lost River suckers in the Lost River subbasin.

Our Response: We agree with the peer reviewer comment and have not referred to this component of the Lost River sucker population as a ''small group'' in this rule.

(3) *Comment:* One peer reviewer stated that most Lost River sucker and shortnose sucker larvae spawned in the Williamson and Sprague River drift downstream very rapidly after swim-up and are in the lake by May, which they considered spring and not mid-summer as stated in the proposed rule.

Our Response: We agree and have made this correction in this rule.

(4) *Comment:* One peer reviewer stated that larval shortnose suckers appear to have a greater affinity for shoreline and marsh habitat than larval Lost River suckers though this differentiation is absent by the time they are juveniles.

Our Response: The updated information provided by the peer reviewer has been noted, and we have changed the text in this rule accordingly.

(5) *Comment:* One peer reviewer stated that the construction of the dams on the Klamath River and creation of Clear Lake Reservoir did create more habitat, but changed the type of habitat from lotic (river) to lentic (lake). The peer reviewer also stated uncertainty about the regulatory implications of what a critical habitat designation means for habitats that have been altered.

Our Response: We agree with the peer reviewer that construction of dams did create more habitat, but changed the type of habitat from lotic (river) to lentic (lake). Though altered from historical conditions, these areas currently provide space for individual and population growth and for normal behavior of Lost River sucker and shortnose sucker (see *Space for Individual and Population Growth and for Normal Behavior* section) and contain the features essential to the conservation of these species. As such, areas designated as critical habitat are subject to regulations under the Act.

(6) *Comment:* One peer reviewer stated that most (but probably not all) Lost River sucker and shortnose sucker larvae in the Sprague River rapidly outmigrate to Upper Klamath Lake. This same pattern of rapid outmigration has not been shown in the Clear Lake or Gerber Reservoir spawning tributaries.

Our Response: We agree and have noted this pattern is known to occur in the Upper Klamath Lake system but not within the Clear Lake or Gerber

spawning tributaries, and we have included this information in this final rule.

(7) *Comment:* One peer reviewer noted that in the proposed rule we identified the maximum algal toxin concentration identified in Primary Constituent Element (PCE) 1 to be less than 1.0 microgram (µg) per liter (L). The peer reviewer stated that this is the World Health Organization maximum concentration of microcysin in drinking water and is probably conservative for suckers. The peer reviewer also stated that the term ''algal toxin'' does not reflect the specific information available on the effects of toxins on fish and should be changed to ''microcystin.''

Our Response: The peer reviewer suggests 1.0 microgram per liter is probably a strict criterion for Lost River sucker and shortnose sucker exposure to microcystin through their environment. However, VanderKooi *et al.* (2010, p. 2) indicate the route of sucker exposure to microcystin is orally via the food chain (from chironomids that feed on *Microcystis* sp.) rather than via environmental exposure at the gills. During their investigation, water quality samples revealed microcystin levels as high as 17 and 6 micrograms per liter in 2007 and 2008, respectively. Because we are unaware at what levels microcystin has a negative effect on suckers, we have changed the PCE to reflect ''low levels'' of microcystin as opposed to a World Health Organization concentration threshold for human drinking water.

(8) *Comment:* One peer reviewer pointed out that preliminary tag-return data indicate that bird predation could substantially affect juvenile Lost River sucker and shortnose sucker survival, and that predation may affect other life stages as well. The peer reviewer suggested that management that reduces bird–fish interactions could improve Lost River sucker and shortnose sucker survival and may warrant a mention in the special management considerations.

Our Response: We have included the updated information provided by the peer reviewer in this rule.

(9) *Comment:* One peer reviewer stated that it did not appear, based on 2011 passive integrated transponder (PIT) tag detections at a remote station on Willow Creek and data collected from adult suckers fitted with radio transmitters, that the relatively low lake levels observed in 2011 adversely affected suckers' ability to access Willow Creek.

Our Response: We have reviewed the information submitted by the peer reviewer and have modified the text to clarify the relationship between flows in Willow Creek, Clear Lake elevation, and access to sucker spawning areas.

(10) *Comment:* One peer reviewer asked whether the most up-to-date lake bathymetry data indicate that access by Lost River sucker and shortnose sucker to Pelican Bay in Upper Klamath Lake could be affected at lower lake levels and if so, at what lake elevation would this occur?

Our Response: We have in our files the most up-to-date bathymetry data acquired from the U.S. Bureau of Reclamation (USBOR 2012) and are in the process of validating the data to determine how lake level alterations may affect access to Pelican Bay. However, this validation process does not influence our decision to designate Pelican Bay in Upper Klamath Lake as critical habitat because that area provides the physical and biological features essential to the conservation of the Lost River sucker and shortnose sucker.

(11) *Comment:* One peer reviewer stated that the pH does not rise as a result of algal decomposition. As a result of photosynthesis, pH is elevated in Upper Klamath Lake during the peak of the *Aphanizomenon flos-aque* bloom. When the bloom subsides and cells decompose pH decreases to around or just above neutral (pH 7).

Our Response: We agree and have addressed the peer reviewer comments for this section.

(12) *Comment:* One peer reviewer notified us that Larson and Brush (2010) have an updated estimate of the amount of wetland acreage converted to agriculture and may be a good updated source to cite.

Our Response: The Larson and Brush (2010) reference provides consistent information on amount of wetland loss surrounding Upper Klamath Lake; they state 66 percent has been converted to agriculture, and the proposed rule states approximately 70 percent. However, the citation is more contemporary, and we agree that it is a good source to cite and have therefore done so.

(13) *Comment:* One peer reviewer questioned our rationale for designating the Wood River as critical habitat for Lost River suckers but not shortnose suckers. The reviewer stated that almost all suckers captured at the mouth of the Wood River by the U.S. Geological Survey (USGS) in 2001 were either shortnose suckers or Klamath largescale suckers.

Our Response: After careful review of the peer reviewer comment and data provided, as well as review of additional information from USBOR that was not in our files when we were developing the proposed rule, we have determined that portions of the Wood River and Crooked Creek contain the features essential to the conservation of the shortnose sucker, and we have designated those areas as critical habitat for the species. The approximate area identified includes 0.31 miles (mi) (0.50 kilometers (km)) of Wood River and 7.26 mi (11.67 km) of Crooked Creek. Our determination to include this additional area as critical habitat for the shortnose sucker is based on information that the area contains the features essential for ensuring that multiple viable spawning populations are conserved throughout the species' range and the area provides spawning and rearing habitat for the species. The additional area we determined and have designated as critical habitat for the shortnose sucker coincides with the area we previously proposed and are now designating for the Lost River sucker. Information documenting shortnose sucker in the Wood River and Crooked Creek is on file and available upon request (see **FOR FURTHER INFORMATION CONTACT** section).

(14) *Comment:* One peer reviewer questioned our rationale for designating the upper Sprague River as critical habitat for Lost River suckers but not shortnose suckers. The reviewer provided USGS tagging data to indicate that at least a small percentage of shortnose suckers ascend the Sprague River at least as far upstream as Braymill, and the peer reviewer stated that some likely go further.

Our Response: The upper Sprague River (upstream of Braymill) was not designated as critical habitat for shortnose sucker because a very small percentage of the radio-tagged individuals have been documented in that reach. In fact, the vast majority of radio-tagged shortnose sucker were not observed migrating upstream beyond Braymill, suggesting that they spawn further downstream than Lost River sucker. Based on this information, we have determined that, although the area on the Sprague River upstream of Braymill contains physical and biological features used by the shortnose sucker, those features are not essential to the conservation of the species in this location. The area, therefore, does not meet the definition of critical habitat for shortnose suckers. However, this finding does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. As such, no change has been made to include shortnose sucker critical habitat on Sprague River above Braymill.

(15) *Comment:* One peer reviewer commented on the *Application of the ''Adverse Modification'' Standard*

section of the proposed rule and stated that other activities that may affect critical habitat include groundwater use and wetland alteration and that these two activities should be specifically mentioned. Water quantity is covered under 1 and sedimentation is covered under 2, but other activities that may affect water quality should be mentioned in adverse modification.

Our Response: We agree that groundwater use and wetland alteration are important factors that may affect habitat for Lost River sucker and shortnose sucker. We have included both of these activities in the *Application of the ''Adverse Modification'' Standard* section.

(16) *Comment:* One peer reviewer stated that the rationale for all water quality limits should be stated and citations given.

Our Response: The water quality limits for temperature, dissolved oxygen, and pH were based on stress thresholds developed by Loftus (2001). We have included this information in the Critical Habitat section below.

(17) *Comment:* One peer reviewer and several commenters stressed that Tule Lake and segments of the Lost River are essential to the conservation and recovery of the species and should therefore be designated as critical habitat.

Our Response: Outside of Upper Klamath Lake, Clear Lake Reservoir, and Gerber Reservoir, Tule Lake is the only known water body where significant Lost River sucker and shortnose sucker populations occur. Historically, Tule Lake was approximately 110,000 ac (44,516 ha) in size during high water times (NRC 2004, p. 96) and was connected to spawning habitat within the Lost River (a tributary of Tule Lake); fish movement occurred between Tule Lake and the upper Lost River basin. Due to habitat alterations from construction of the Klamath Reclamation Project (Project), Tule Lake currently has a maximum size of approximately 13,000 ac (5261 ha; NCR 2004, p. 96) during high water times and fish movement to the upper Lost River basin is no longer possible. Currently, Lost River sucker and shortnose sucker larvae can pass through the fish screen on the A-canal diversion on Upper Klamath Lake, upstream of Tule Lake, and are found throughout the canal system on the Project. We believe Lost River sucker and shortnose sucker in Tule Lake originate from Upper Klamath Lake and move through the canals on the Project to Tule Lake, which serves as a drainage sump for the Project for used agricultural runoff. Fish collected from fish salvage efforts from Project canals at the end of the irrigation season also provide Lost River sucker and shortnose sucker individuals to Tule Lake.

The habitat of Tule Lake, although able to support Lost River sucker and shortnose sucker, does not provide spawning habitat or contain a viable self-sustaining population of Lost River suckers or shortnose suckers (see *Criteria Used To Identify Critical Habitat* item (4) below). Without the inadvertent influx of additional fish from Upper Klamath Lake, the population of Lost River sucker and shortnose sucker would most likely dissipate. In addition, as planned water conservation efforts are implemented in the water service area and on the Project, water within the drainage system would most likely be reduced. This reduction in water may limit future movement of Lost River sucker and shortnose sucker from Upper Klamath Lake to Tule Lake. With less water in the system, fish salvage efforts and the number of fish collected and provided to Tule Lake would be further reduced.

In determining which areas to identify as critical habitat, we examined the geographic locations currently occupied by Lost River sucker and shortnose sucker, like Tule Lake, to see if the physical or biological features (PBFs) essential to the conservation of these species were present. Anderson-Rose Dam completely blocks access to suitable spawning habitat for Lost River sucker and shortnose sucker in Tule Lake. Habitat downstream of the dam does not appear to provide suitable spawning and rearing habitat, and no successful spawning or recruitment is known to occur in Tule Lake or its tributaries. Currently, Tule Lake functions only as a sink for Lost River sucker and shortnose sucker populations and does not meet the criteria used to identify critical habitat (see *Criteria Used To Identify Critical Habitat*). Therefore, we are not designating Tule Lake as critical habitat as this habitat does not provide the physical or biological features essential to the conservation of either species.

Although the current habitat conditions in Tule Lake fail to meet the definition of critical habitat, the Lost River sucker and shortnose sucker populations in this water body remain important for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to insure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) section 9 of the Act's prohibitions on taking any individual of the species, including taking caused by actions that affect habitat. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. The Tule Lake populations of Lost River sucker and shortnose sucker are important because they represent additional populations of suckers throughout the species' ranges and may provide source populations of suckers for potential augmentation or research opportunities. Furthermore, the Draft Revised Recovery Plan for the Lost River Sucker and Shortnose Sucker (Service 2011) includes high-priority actions to improve conditions for these populations and restore access to sufficient suitable spawning habitat, and as a result, Tule Lake may be able to contribute even more substantially to recovery in the future.

Comments From State(s)

Section 4(i) of the Act states, ''the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition.'' Comments received from the State of Oregon regarding the proposal to designate critical habitat for the Lost River sucker and shortnose sucker are addressed below. We did not receive comments from the State of California.

(18) *Comment:* The State suggested that the Wood River, Sycan River, Lost River, and Miller Creek should be designated as critical habitat since Lost River sucker and shortnose sucker are present.

Our Response: We agree with the commenter and, as a result of the information that was not available to us at the time of writing the proposed critical habitat rule, as well as new information that has been gathered since the proposed rule was published, we have refined this final designation and included additional areas we have determined to meet the definition of critical habitat for the shortnose sucker in the Wood River. These areas coincide with areas we previously proposed as critical habitat for the Lost River sucker. However, we have determined that the areas identified within the Sycan River, Lost River, and Miller Creek do not meet the criteria we used to identify critical habitat for the shortnose or Lost River

sucker (see *Criteria Used To Identify Critical Habitat*). Therefore, we are not designating these areas as critical habitat as these areas do not provide the essential physical or biological features necessary for contribution to conservation of either species.

Public Comments

Expansion of Designation

(19) *Comment:* Several commenters suggested that wetlands, including Agency Ranch and Barnes Ranch, surrounding Upper Klamath Lake and Agency Lake, should be designated as critical habitat to maximize Lost River sucker and shortnose sucker recovery potential.

Our Response: Major wetland areas surrounding Upper Klamath Lake, including the Williamson River delta and the Upper Klamath National Wildlife Refuge, were proposed and are being included in the designation of critical habitat. However, some lands adjacent to these areas (i.e., Barnes Ranch, Agency Ranch) have not been included because they do not meet the definition of critical habitat. Although Lost River sucker and shortnose sucker are present occasionally on the ranches, they enter via an unscreened diversion. Once on the ranches, they are considered lost to the population. We will continue to work on restoration of these ranches and issues related to water diversion in the future for the benefit of sucker recovery.

(20) *Comment:* A commenter suggested that the Service needs to designate the entire Clear Lake National Wildlife Refuge as critical habitat for the two species.

Our Response: We have defined the lateral extent of critical habitat in Clear Lake Reservoir by the perimeter of the water body as mapped according to the USGS 2009 National Hydrography Dataset. Designating the surrounding Refuge uplands would be inconsistent with designating lateral extent of critical habitat in other waterbodies because the Refuge uplands do not contain the physical or biological features essential to the conservation of these species.

(21) *Comment:* A commenter stated that Lower Klamath Lake should be included as critical habitat.

Our Response: Please see the definition of critical habitat in the rule below. Although Lower Klamath Lake was occupied historically, it was not occupied at the time of listing. Lower Klamath Lake was historically connected to the Klamath River, but the construction of the railroad, dikes, and water management facilities has significantly altered this habitat. Lower Klamath Lake is no longer connected to the Klamath River and is dry in portions of the year. Because the habitat within Lower Klamath Lake is significantly altered and no longer connected to the Klamath River, we have determined that this area does not meet the definition of critical habitat under section 3(5)(A)(ii) of the Act.

(22) *Comment:* One commenter was opposed to the designation and/or apparent expansion of critical habitat for the Lost River sucker and shortnose sucker.

Our Response: Under section 4(b)(3)(A) of the Act, we are required to designate critical habitat to the maximum extent prudent and determinable for any endangered or threatened species. On December 1, 1994, we published in the **Federal Register** proposed critical habitat for Lost River sucker and shortnose sucker (59 FR 61744); that proposal was never finalized. In a stipulated settlement agreement we agreed to submit to the **Federal Register** a final critical habitat designation for the Lost River sucker and the shortnose sucker no later than November 30, 2012 (*Wood et al.* v. *Thorson et al.,* No. 91–cv–6496–TC (D. Or.)). Due to advancement in our understanding of Lost River sucker and shortnose sucker ecology and habitat requirements, and technological advancements in mapping made available since preparing the 1994 proposed rule, we published a revised proposed critical habitat rule in the **Federal Register** on December 7, 2011 (76 FR 76337). This final critical habitat rule does not represent an expansion of the 1994 proposed rule. Rather, this rule represents approximately 73 percent less habitat than was proposed for designation in the 1994 rule.

(23) *Comment:* One commenter stated the Service should consider expanding the lateral reach of critical habitat to include a riparian buffer zone that is fully adequate to ensure water quality is maintained within the designated waters.

Our Response: We used bankfull conditions to determine the aquatic limits of critical habitat for the Lost River sucker and shortnose sucker. Bankfull width can be described as the flow that just fills the stream channel to the top of its nearest banks but below a point where the water begins to overflow onto a floodplain. Most aquatic systems, including those in the Klamath Basin, do not maintain water year-round at the bankfull limits even during years with high water availability. As a result, the actual aquatic limit (and by default the habitat available to the Lost River sucker and shortnose sucker) for the majority of time is well below the bankfull limit. Therefore, some riparian and wetland vegetation likely occurs in most of these areas and are by default part of the designation. These riparian and wetland vegetation areas below the bankfull limit assist in providing protection from erosion and help maintain water quality. However, we acknowledge that certain activities that occur outside of the lateral extent of critical habitat may impact critical habitat. For example, upland management practices such as road construction and maintenance or timber harvest may affect adjacent aquatic habitat if measures are not in place to alleviate any negative effects. We will implement this rule consistent with our analysis of these effects, and work closely and cooperatively with Federal agencies (or other entities where a Federal nexus exists), to ensure any such actions do not adversely modify designated critical habitat and that conservation measures are in place to protect the habitat and the two species.

Grazing and Agriculture

(24) *Comment:* Several commenters stated grazing can be beneficial for watershed health and are opposed to citing grazing as a threat to Lost River sucker and shortnose sucker habitat. Additionally, one commenter stated that if there is no risk to Lost River sucker and shortnose sucker habitat from grazing then there is no valid reason to designate critical habitat.

Our Response: The Lost River sucker and shortnose sucker listing rule (53 FR 27130) first identified livestock grazing (among other factors) as a threat to both species. We agree with the commenters that depending on how grazing is managed, there can be beneficial watershed effects from grazing. However, the purpose of this rule is to determine the areas that contain the physical and biological features essential to the conservation of the Lost River sucker and shortnose sucker and areas otherwise essential for the conservation of the species and not to discuss the factors leading to the species' decline.

(25) *Comment:* One commenter stated that the designation of critical habitat will equate to maintaining elevated water levels in reservoirs thereby reducing water for agriculture.

Our Response: In and of itself, critical habitat does not have implications for changes in lake level management or water delivery. Where a Federal nexus exists, consideration of any effects to the physical or biological features essential to the conservation of Lost River sucker and shortnose sucker from water

delivery and distribution operations, including water quantity and water quality, would be undertaken to assess the potential for adverse modification or destruction of habitat. We will continue to work cooperatively with land managers and water operators to implement Lost River sucker and shortnose sucker conservation measures in a manner consistent with the operators' needs to the maximum extent of the law.

Economic Analysis

(26) *Comment:* One commenter stated that the economic analysis noted the Service would not anticipate any differences in the recommendation for avoiding jeopardy versus adverse modification. Thus, the additional application of the adverse modification standard (i.e., designation of critical habitat) would be inconsequential and essentially redundant.

Our Response: Under section 4(b)(3)(A) of the Act, we are required to designate critical habitat to the maximum extent prudent and determinable for any endangered or threatened species. Although there may appear to be redundancy in a section 7 analysis on a proposed Federal action, the purposes of a jeopardy analysis and adverse modification determination are not the same. A jeopardy analysis determines if implementation of a proposed action is likely to cause an appreciable reduction in the likelihood of both the survival and recovery of a listed species in the wild. In contrast, an adverse modification analysis determines if the physical or biological features of critical habitat would remain functional to serve the intended recovery role for the species as a result of implementation of a proposed Federal action. Because all the areas being designated are occupied by the species during some period of its life history, our effects analysis also includes potential effects to the habitat not under just an extinction standard but also a conservation standard for the species. The analysis of effects of a proposed Federal action on critical habitat is both separate from and different from that of the effects of a proposed project on the species itself. The jeopardy analysis evaluates whether a proposed action would appreciably reduce the likelihood of both survival and recovery of a listed species, while the destruction or adverse modification analysis evaluates how the action could affect the conservation value of designated critical habitat to the listed species. Therefore, the difference in outcomes of these two analyses represents the regulatory benefit of critical habitat. The addition of this regulatory benefit for these species may, in many instances, lead to different results and give rise to different regulatory requirements, which may then apply to a proposed Federal action. However, as we stated in the economic analysis, in most cases for this designation the difference between the two standards would be minimal.

(27) *Comment:* One commenter noted an area can be designated as critical habitat only if it includes both features essential to the conservation of the species and which may require special management considerations or protection. Appendix C of the draft economic analysis specifically demonstrates that the areas of interest to the Klamath Water Users Association (KWUA) do not require special management considerations or protection. Thus, the areas of interest to the KWUA do not qualify as critical habitat under the statutory definition.

Our Response: Appendix C of the economic analysis, which is the ''Incremental Effects Memorandum for the Economic Analysis of the Proposed Rule To Designate Critical Habitat for Lost River Sucker and Shortnose Sucker,'' was written to provide information to serve as a basis for conducting an economic analysis. The focus of the incremental analysis is to determine the impacts on land uses and activities from the designation of critical habitat that are above and beyond those impacts resulting from listing. The incremental analysis does not focus on special management considerations or protection. Additionally, under section 3(5)(A)(i) of the Act, the term critical habitat is defined as the specific areas within the geographic area occupied by the species at the time it is listed on which are found those physical or biological features that are (I) essential to the conservation of the species and (II) which may require special management considerations or protection. The definition does not state that an area must require special management consideration or protection for it to be designated as critical habitat. Special management considerations or protection are specifically discussed in the critical habitat rule (see *Special Management Considerations or Protection* section below). We designated the areas of interest to KWUA because we determined that they meet the definition of critical habitat.

(28) *Comment:* One commenter noted the Act authorizes the Service to exclude otherwise eligible areas from designation if it is determined that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat. The proposed rule has not identified any benefit of specifying Project-related waters as part of critical habitat. The draft economic analysis has, however, identified benefits of exclusion, including administrative costs that would arise if critical habitat was designated. Thus, the areas of interest to the KWUA should not qualify as critical habitat as the costs of exclusion outweigh the benefits of designation.

Our Response: As previously noted, under section 4(b)(3)(A) of the Act, we are required to designate critical habitat to the maximum extent prudent and determinable for any endangered or threatened species. In making this determination the Secretary shall designate areas based on the best scientific data available after taking into consideration the economic, national security, or any other impact of specifying any such area as critical habitat. Also under section 4(b)(2) of the Act, the Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of inclusion unless such a failure to designate the area would result in the extinction of the species concerned. We designated the identified areas as critical habitat because they contain the physical or biological features essential to the conservation of Lost River sucker and shortnose sucker. We also completed an economic analysis on the proposed designation and did not identify any areas or activities that may incur disproportionately higher incremental economic impacts as a result of the designation, and no changes in land or water management are expected to result from the critical habitat designation. We believe any administrative costs associated with consultation for adverse modification would be minimal as these areas are considered occupied and used by the two species, and consultation on actions with a Federal nexus would need to occur under section 7 of the Act regardless of whether the area is designated as critical habitat or not. As a result of these areas being designated as critical habitat, having no disproportionately higher incremental economic impacts, and additional consultation impacts being minimal, the Secretary is not exercising discretion to exclude the areas of interest to the KWUA under section 4(b)(2) of the Act.

(29) *Comment:* One commenter was unable to discern from the draft economic analysis the estimated total non-Federal costs, or the split between Federal and non-Federal costs.

Our Response: Although the draft economic analysis does not explicitly differentiate between Federal and non-Federal costs, Exhibits 2–2 and 4–2 provide a breakdown of the per-consultation costs to the Service, the consulting Federal agency, and third parties involved in the consultation. In addition, Exhibit A–1 of the draft economic analysis provides the projected annualized impacts to small entities anticipated to be third parties to future consultations. As the majority of consultations forecasted in the economic analysis involves only Federal agencies, the majority of costs are anticipated to be borne by Federal agencies.

(30) *Comment:* One commenter notes that the draft economic analysis makes reference to the California Environmental Quality Act (CEQA). Assuming there might be a project in critical habitat that is subject to CEQA, the draft economic analysis states that the designation ''may'' prevent certain types of projects from ''claiming a categorical exemption from CEQA.'' The commenter states that there is no analysis, explanation, or justification for this statement.

Our Response: As noted on page ES–3 of the draft economic analysis, the designation for the suckers is not expected to result in indirect impacts resulting from CEQA or other regulations. GIS analysis indicates that areas proposed as critical habitat in Modoc County, California, are managed either as national wildlife refuge lands or as Federal grazing allotments. In addition, no projects on private lands in these areas were identified during the public comment period. Therefore, the analysis does not forecast any indirect impacts from CEQA in these areas. Language on pages ES–3, 4–10, and 4–11 of the Final Economic Analysis has been updated to clarify this finding.

General Comments

(31) *Comment:* Designation of critical habitat amounts to Federal possession of private land.

Our Response: Designation of critical habitat does not affect land ownership or establish a refuge or preserve, and has no impact on private landowners implementing actions on their land that do not require Federal funding or permits. In addition, in accordance with Executive Order 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for Lost River sucker and shortnose sucker in a takings implications assessment. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. The takings implications assessment concludes that this designation of critical habitat for Lost River sucker and shortnose sucker does not pose significant takings implications for lands within or affected by the designation.

(32) *Comment:* One commenter requested that lands covered under the draft habitat conservation plan being developed by PacifiCorp and the Service should be excluded from designated critical habitat.

Our Response: We are in the process of developing a Habitat Conservation Plan (HCP) with PacifiCorp for the Lost River sucker and shortnose sucker. The goal of the HCP is to minimize impacts to covered species, and to permit incidental take resulting from the operation of their hydroelectric facilities on the Klamath River. Covered lands in the draft HCP include: (1) The Klamath River (also containing the Link River), between the outlet of Upper Klamath Lake (River Mile 255) and the Iron Gate Fish Hatchery below Iron Gate Dam (River Mile 189.3); (2) lands within 300 feet (ft) (91 meters (m)) of the ordinary high water line of the Klamath River and its reservoirs between these two locations; and (3) land areas owned by PacifiCorp adjacent to the Klamath River that are associated with the hydroelectric facilities.

The PacifiCorp lands adjacent to the Klamath River (identified in (1) above) do not support the physical or biological features essential to the conservation of the Lost River sucker and shortnose sucker and have not been proposed as critical habitat.

The portion of PacifiCorp lands covered by the draft HCP that meets the definition of critical habitat for the Lost River sucker and shortnose sucker is within 300 ft (91 m) of the ordinary high water line (analogous to bankfull width) of the Klamath River downstream to Keno Dam. However, PacifiCorp's operation of the hydroelectric facilities do not impact these lands. PacifiCorp has not proposed conservation activities for these areas. Therefore, the Secretary is not exercising discretion to exclude these areas under section 4(b)(2) of the Act.

(33) *Comment:* One commenter suggested a more current reference (i.e., USFS 2010, p. 7) for our statement: ''A high density of forest roads remain in the upper Klamath River basin, and many of these are located near streams where they likely contribute sediment (USFS 1995, p. 7).''

Our Response: We acknowledge the updated reference and have included it in the rule.

(34) *Comment:* One commenter could find no definition for the acronym ''PBF.''

Our Response: PBF is physical or biological feature. We neglected to parenthetically reference PBF after its first use but have corrected this oversight in this final rule.

(35) *Comment:* One commenter stated that including the unnamed tributary to Dry Prairie Reservoir, which does not have consistent habitat available, seems to contradict the sixth criterion used to identify critical habitat (p. 76345).

Our Response: Despite not having consistent flows each spring, when flows are present, shortnose suckers have been documented ascending this unnamed tributary to spawn. We have determined that this unnamed tributary provides the physical or biological features essential to the conservation of shortnose sucker and thus provides for the conservation of the species. As such, we have included this unnamed tributary in this designation.

(36) *Comment:* One commenter urged the Service to consider modifying its special management provisions for exotic predatory fish to include exotics from other Orders, such as bullfrogs (*Lithobates catesbeianus*), that are potential predators on sucker fry.

Our Response: We are unaware of any studies, and the commenter did not provide studies, documenting bullfrog predation on Lost River sucker or shortnose sucker. Thus, we have not included bullfrog in the list of predators.

(37) *Comment:* Several commenters stated it is premature to issue the proposed rule absent an economic analysis of the designation.

Our Response: Under our current regulations at 50 CFR 424.19, the Secretary shall identify any significant activities that would either affect an area considered for designation as critical habitat or be likely to be affected by the designation, and shall, after proposing designation of such an area, consider the probable economic and other impacts of the designation upon proposed or ongoing activities (77 FR 51503; August 24, 2012). We interpret ''after proposing'' to mean after publication of the proposed rule. As a result, we issued a draft economic analysis along with our revised critical habitat proposal in the **Federal Register** on July 26, 2012 (77 FR 43796), and

solicited public comment on both documents.

(38) *Comment:* One commenter stated that recreational fishing should be included as one of the factors leading to the decline of suckers.

Our Response: We agree with the reviewer's comment and note that, although recreational angling for these species is presently prohibited, historic recreational angling was a reason for decline of Lost River sucker and shortnose sucker (53 FR 27132). However, the purpose of this rule is to determine the areas that meet the definition of critical habitat for the Lost River sucker and shortnose sucker and identify these areas for designation, not to discuss the factors leading to the species decline.

(39) *Comment:* One commenter stated that the natural eutrophication process of Upper Klamath Lake should be addressed in greater detail, including a discussion of pre- and post-1900 water quality.

Our Response: This rulemaking is for designating critical habitat. As a result, we do not think an extended discussion of this topic in a critical habitat rule is an appropriate venue for dissemination of such information. We point to several references within the *Special Management Considerations or Protection* section below related to a changing algal community and the hypereutrophic nature of Upper Klamath Lake, which are available upon request (see **FOR FURTHER INFORMATION CONTACT** section).

(40) *Comment:* One commenter requested that the term ''bankfull'' should be defined.

Our Response: Bankfull width can be described as the flow that just fills the stream channel to the top of its nearest banks but below a point where the water begins to overflow onto a floodplain. In lakes or reservoirs, the lateral extent of bankfull conditions and boundaries are defined according to the USGS 2009 National Hydrography Dataset. We used bankfull conditions to determine the aquatic limits of critical habitat for the Lost River sucker and shortnose sucker. We have defined the term ''bankfull'' in our *Criteria Used To Identify Critical Habitat* section.

(41) *Comment:* One commenter stated that in the ''Exclusions Based on Other Relevant Impacts'' section of the proposed rule, we indicated that there are no other management plans for these species. However, the Klamath Basin Restoration Agreement (KBRA) is one such example.

Our Response: While the KBRA holds much promise for enhancing survival and recovery of Lost River sucker and shortnose sucker, it was not included in this section because the agreement has yet to be authorized and funded by Congress.

Summary of Changes From Proposed Rule

In preparing this final critical habitat designation, we reviewed and considered comments from peer reviewers and the public on the revised proposed critical habitat rule. We also made a draft economic analysis available and solicited comment from the public on both the revised proposed designation and the draft economic analysis (77 FR 43796; July 26, 2012). As a result of the peer review and public comments received, we made slight changes to this final rule as described in the **Summary of Comments and Recommendations** section above.

During finalization of our critical habitat designation, we discovered errors in the calculation of some of the totals for the proposed units in Table 1 and Table 3 in the revised proposed designation (76 FR 76337; December 7, 2011). The ownership totals for Table 1 and Table 3 were incorrect; however, the individual ownership totals for each unit were correctly identified. We have corrected these errors, and the correct totals can be found in Table 1 and Table 3 of this final rule.

In addition, based on a peer review comment we received regarding the absence of critical habitat for shortnose sucker in the Wood River, we have reevaluated whether we should include the Wood River as critical habitat for shortnose sucker. In our revised proposed rule, we identified this area as critical habitat for the Lost River sucker but not for the shortnose sucker. As a result of the information that was not available to us at the time of writing the proposed critical habitat rule, as well as new information that has been gathered since the rule was published, we have refined this final designation and included additional areas for shortnose sucker in the Wood River as critical habitat to coincide with areas also identified as critical habitat for the Lost River sucker. This information documents shortnose sucker habitat and presence in the Wood River, and likely Crooked Creek, and that these areas are presumably being used by the species for spawning. Our determination to include this additional area as critical habitat for the shortnose sucker is based on information that the area provides spawning and rearing habitat for the species and contains the physical or biological features and as a result is important for ensuring multiple viable spawning populations are conserved throughout the species' range. As such, we have designated approximately an additional 7 mi (12 km) of stream length in Unit 1 for shortnose sucker that includes the same sections of the Wood River and Crooked Creek that were proposed and now designated in Unit 1 for the Lost River sucker (see Table 4 below).

Critical Habitat

Background

Critical habitat is defined in section 3(5)(A) of the Act as:

(i) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of the Act, on which are found those physical or biological features

(I) Essential to the conservation of the species and

(II) Which may require special management considerations or protection; and

(ii) Specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of the Act, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3(3) of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery,

or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical and biological features within an area, we focus on the principal biological or physical constituent elements (primary constituent elements such as roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type) that are essential to the conservation of the species. Primary constituent elements are the specific elements of physical or biological features that further define the species' life-history requirements that are essential to the conservation of the species.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. For example, an area currently occupied by the species but that was not occupied at the time of listing may be essential to the conservation of the species and may be included in the critical habitat designation. We designate critical habitat in areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, other unpublished materials, or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to insure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) section 9 of the Act's prohibitions on taking any individual of the species, including taking caused by actions that affect habitat. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Physical or Biological Features

In accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, in determining which areas within the geographical area occupied by the species at the time of listing to designate as critical habitat, we consider the physical or biological features essential to the conservation of the species and which may require special management considerations or protection. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of a species.

We derive the specific physical or biological features essential for Lost River sucker and shortnose sucker from studies of this species' habitat, ecology, and life history as described in the **Critical Habitat** section of the proposed rule to designate critical habitat published in the **Federal Register** on December 7, 2011 (76 FR 76337), and in the information presented below. Additional information can be found in the final listing rule published in the **Federal Register** on July 18, 1988 (53 FR 27130), and the Draft Revised Recovery Plan for the Lost River Sucker and Shortnose Sucker (Service 2011). We have determined that Lost River sucker and shortnose sucker require the following physical or biological features:

Space for Individual and Population Growth and for Normal Behavior

Lakes, streams, marshes, and spring habitats with migratory corridors between these habitats provide space for individual and population growth and for normal behavior.

Lost River sucker spend most of their lives within lakes although they primarily spawn in streams (Moyle 2002, p. 199). Spawning occurs in late winter and early spring in major

tributaries to lakes where they occur. In addition, a subpopulation of Lost River sucker utilizes spring areas within Upper Klamath Lake for spawning (Janney *et al.* 2008, p. 1813). After hatching, larval Lost River sucker drift downstream within spawning tributaries and reach lakes by spring. Larval habitat is generally along the shoreline, in water 6 inches (in) to 20 in (10 centimeters (cm) to 50 cm) deep where emergent vegetation provides cover from predators, protection from currents and turbulence, and abundant food (Cooperman and Markle 2004, p. 375). As larval suckers grow into the juvenile stage, they increasingly use deeper habitat with and without emergent vegetation. Adult Lost River sucker primarily use deep (greater than 6.6 ft (2.0 m)), open-water habitat as well as spring-influenced habitats that act as refugia during poor water quality events (Banish *et al.* 2009, pp. 159–161, 165).

Reservoirs also figure prominently in meeting the requirements for space for individual and population growth and for normal behavior of Lost River sucker. Much of the upper Klamath River basin landscape has been hydrologically altered since Anglo-European settlement, including construction of reservoirs. Some reservoirs have adversely affected Lost River sucker, while others may provide benefits. For example, the dam on Malone Reservoir blocks access to historical Lost River sucker habitat for individuals migrating in the mainstem Lost River. In contrast, construction of hydroelectric dams on the mainstem Klamath River and construction of Clear Lake Reservoir likely have increased the amount of available habitat.

Because shortnose sucker share the same habitats as Lost River sucker, the lakes, reservoirs, streams, marshes, and spring habitats with migratory corridors between these habitats also provide space for individual and population growth and for normal behavior of shortnose sucker. In contrast to larval Lost River sucker, larval shortnose sucker are more closely associated with shoreline and marsh habitat, although this distinction appears to disappear by the time both species become juveniles. Therefore, based on the information above, we identify lakes, reservoirs, streams, marshes, and spring habitats with migratory corridors between these habitats to be a physical or biological feature essential for the conservation of both Lost River sucker and shortnose sucker.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Adult Lost River sucker have subterminal mouths and gill raker structures that are adapted for feeding primarily on bottom-dwelling (benthic) macroinvertebrates in lake environments (NRC 2004, p. 190). Prey selection, however, appears to be a function of developmental shifts in habitat use. Lost River sucker larvae feed near the surface of the water column, primarily on chironomids (commonly called ''midges''; a family of small flies whose larval and pupal stages are mainly aquatic) (Markle and Clauson 2006, pp. 494–495). Juvenile Lost River sucker rely less on surface-oriented feeding and shift to prey items from benthic areas. For instance, Markle and Clauson (2006, pp. 495–496) documented that juvenile Lost River suckers consumed chironomid larvae as well as microcrustaceans (amphipods, copepods, cladocerans, and ostracods). As adults, Lost River sucker consume many of these same items (Moyle 2002, pp. 199–200).

Shortnose sucker have terminal mouths and gill raker structures adapted for feeding on zooplankton (Moyle 2002, p. 203; NRC 2004, p. 190). Similar to Lost River sucker, shortnose sucker also exhibit a shift in prey selection as they mature (Markle and Clauson 2006, pp. 494–495). Adult shortnose sucker also consume many of the same prey items as juveniles, including chironomid larvae, amphipods, copepods, cladocerans, and ostracods (Moyle 2002, p. 203; Markle and Clauson 2006, pp. 494–495).

Habitats must provide the necessary conditions, including water with sufficient phytoplankton and fine aquatic substrate, to harbor prey species in sufficient quantity and diversity to meet the nutritional and physiological requirements necessary to maintain Lost River sucker and shortnose sucker populations. Therefore, based on the information above, we identify an abundant food base, including a broad array of chironomids, microcrustaceans, and other small aquatic macroinvertebrates, to be a biological feature essential for both Lost River sucker and shortnose sucker.

Cover or Shelter

The cover and shelter components, including emergent vegetation and depth, are the same for shortnose sucker as for Lost River sucker. Lost River sucker and shortnose sucker larvae density is generally higher within and adjacent to emergent vegetation than in areas devoid of vegetation (Cooperman and Markle 2004, p. 374; Crandall *et al.* 2008, p. 413; Erdman and Hendrixson 2009, p. 18; Cooperman *et al.* 2010, p. 34). Emergent vegetation provides cover from predators and habitat for prey such as zooplankton, macroinvertebrates, and periphyton (Klamath Tribes 1996, p. 12; Cooperman and Markle 2004, p. 375). Such areas also may provide refuge from wind-blown current and turbulence, as well as areas of warmer water temperature, which may facilitate larval growth (Cooperman and Markle 2004, p. 375; Crandall 2004, p. 7; Cooperman *et al.* 2010, pp. 35–36).

Different life stages use different water depths as cover or shelter. Juvenile Lost River sucker and shortnose sucker primarily use relatively shallow (less than approximately 3.9 ft (1.2 m)) vegetated areas, but may also begin to move into deeper, unvegetated, off-shore habitats (Buettner and Scoppettone 1990, pp. 33, 51; Markle and Clauson 2006, p. 499). Data from Upper Klamath Lake indicate juveniles less than 1 year of age often are found at depths less than 3 ft (1.0 m) in May and June, but shift in late July to water 5 to 6.5 ft (1.5 to 2.0 m) deep (Burdick and Brown 2010, p. 50). No similar data exist from other occupied water bodies. Similarly, 1-year-old juveniles occupy shallow habitats during April and May, but may move into deeper areas along the western shore of Upper Klamath Lake (e.g., Eagle Ridge trench) until dissolved oxygen levels become reduced in mid- to late-July (Bottcher and Burdick 2010, p. 17; Burdick and VanderKooi 2010, p. 13). Juveniles then appear to move into shallower habitat along the eastern shore or main part of Upper Klamath Lake (Bottcher and Burdick 2010, p. 17).

It is assumed that subadults (individuals that display all of the characteristics of adults with the exception of reproductive maturity and reproductive structures (tubercles)) utilize habitats similar to adults (NRC 2004, p. 199). Adult Lost River sucker and shortnose sucker inhabit water depths of 3.0 to 15.7 ft (0.9 to 4.8 m) (Reiser *et al.* 2001, pp. 5–26; Banish *et al.* 2009, p. 161). In addition, cover (e.g., large woody debris) is sparse in many of the lentic habitats occupied by adult Lost River sucker and shortnose sucker, so water depth or turbidity may provide concealment from avian predators (Banish *et al.* 2009, p. 164).

Therefore, based on the information above, we identify lakes and reservoirs with adequate amounts of emergent vegetation of appropriate depth and water quality to provide for cover and shelter as described above to be a

physical or biological feature essential for the conservation of the Lost River sucker and shortnose sucker. Although specific data are lacking, it is also likely that wetland and riparian vegetation along river corridors are important for juvenile sucker cover and rearing.

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

Throughout their range, Lost River sucker ascend large tributary streams to spawn, generally from February through April, often corresponding with spring snowmelt (Moyle 2002, p. 200; NRC 2004, p. 194). They have been documented migrating upstream as many as 75 mi (120 km) in the Sprague River (Ellsworth *et al.* 2007, p. 20). Beginning at the same time, a segment of the Lost River sucker population uses shoreline areas affected by input of spring discharge for spawning in Upper Klamath Lake (Janney *et al.* 2008, p. 1813). In rivers, spawning occurs in riffles and pools over gravel and cobble substrate at depths less than 4.3 ft (1.3 m) and velocities up to 2.8 ft per second (85 cm per second; Buettner and Scoppettonne 1990, p. 20; Moyle 2002, p. 200; NRC 2004, p. 194). At shoreline spring habitat, spawning occurs over similar substrate and at similar depths. Females broadcast their eggs, which are fertilized most commonly by two accompanying males (Buettner and Scoppettone 1990, p. 17). The fertilized eggs settle within the top few inches of the substrate until hatching, around 1 week later. In the Sprague and Williamson Rivers that drain into Upper Klamath Lake, larvae spend little time in these rivers after swim-up, but quickly drift downstream (Cooperman and Markle 2003, pp. 1147–1149). Downstream movement occurs mostly at night near the water surface (Ellsworth *et al.* 2010, pp. 51–52). Larvae transform into juveniles by mid-July at about 0.98 in (25 mm) total length. Juvenile Lost River sucker primarily occupy relatively shallow (less than approximately 1.6 ft (50 cm)), vegetated areas, but also may begin to move into deeper, unvegetated, off-shore habitats as they grow (Buettner and Scoppettone 1990, pp. 32–33; NRC 2004, p. 198).

Throughout their range, shortnose sucker ascend large tributary streams to spawn, generally from February through May, often corresponding with spring snowmelt (Moyle 2002, p. 204; NRC 2004, p. 194). Shortnose sucker have been documented migrating upstream as far as 8 mi (13 km) in the Sprague River (Ellsworth *et al.* 2007, p. 20). Spawning at shoreline springs in Upper Klamath Lake by shortnose sucker is presently rare (NRC 2004, p. 194). In lotic habitat, spawning occurs in similar habitat as Lost River sucker spawning, although spawning may occur in areas with greater stream flow (up to 4.1 ft per second (125 cm per second); Moyle 2002, p. 204). At shoreline spring habitat, spawning occurs over similar substrate and at similar depths to Lost River sucker spawning. Females broadcast their eggs, which are fertilized most commonly by two accompanying males (Buettner and Scoppettone 1990, p. 44). Larval out-migration, and larval and juvenile rearing patterns, are similar to Lost River sucker (Buettner and Scoppettone 1990, p. 51; Cooperman and Markle 2004, pp. 374–375; NRC 2004, p. 198; Ellsworth *et al.* 2010, pp. 51–52).

Therefore, based on the information above, we identify accessible lake and river spawning locations that contain suitable water flow, gravel and cobble substrate, and water depth (as well as flowing water) that provide for larval out-migration and juvenile rearing habitat as described above to be essential physical or biological features for both Lost River sucker and shortnose sucker.

Primary Constituent Elements for Lost River Sucker and Shortnose Sucker

Under the Act and its implementing regulations, we are required to identify the physical or biological features essential to the conservation of Lost River sucker and shortnose sucker in areas occupied at the time of listing, focusing on the features' primary constituent elements. Primary constituent elements (PCEs) are those specific elements of the physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species.

Based on our current knowledge of the physical or biological features and habitat characteristics required to sustain the species' life-history processes, we determine that the primary constituent elements specific to Lost River sucker and shortnose sucker are:

(1) *Water.* Areas with sufficient water quantity and depth within lakes, reservoirs, streams, marshes, springs, groundwater sources, and refugia habitats with minimal physical, biological, or chemical impediments to connectivity. Water must have varied depths to accommodate each life stage: Shallow water (up to 3.28 ft (1.0 m)) for larval life stage, and deeper water (up to 14.8 ft (4.5 m)) for older life stages. The water quality characteristics should include water temperatures of less than 28.0 °Celsius (82.4 °F); pH less than 9.75; dissolved oxygen levels greater than 4.0 mg per L; low levels of microcystin; and un-ionized ammonia (less than 0.5 mg per L). Elements also include natural flow regimes that provide flows during the appropriate time of year or, if flows are controlled, minimal flow departure from a natural hydrograph.

(2) *Spawning and rearing habitat.* Streams and shoreline springs with gravel and cobble substrate at depths typically less than 4.3 ft (1.3 m) with adequate stream velocity to allow spawning to occur. Areas containing emergent vegetation adjacent to open water, provides habitat for rearing and facilitates growth and survival of suckers, as well as protection from predation and protection from currents and turbulence.

(3) *Food.* Areas that contain an abundant forage base, including a broad array of chironomidae, crustacea, and other aquatic macroinvertebrates.

With this designation of critical habitat, we have identified the physical or biological features essential to the conservation of the species, through the identification of the features' primary constituent elements that support the life-history processes of the species.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features that are essential to the conservation of the species and which may require special management considerations or protection. Threats identified in the final listing rule for these species include: (1) Poor water quality; (2) potential entrainment at water diversion structures; (3) lack of access to essential spawning habitat; (4) lack of connectivity to historical habitat (i.e., migratory impediments); (5) degradation of spawning, rearing, and adult habitat; and (6) avian predation and predation by or competition with nonnative fish.

Poor water quality is particularly associated with high abundance of the blue-green alga *Aphanizomenon flos-aque.* Core samples of bottom sediments indicate that *A. flos-aque* was not present in Upper Klamath Lake prior to the 1900s (Bradbury *et al.* 2004, p. 162; Eilers *et al.* 2004, p. 14). Its appearance is believed to be associated with increases in productivity of the lake through human influence (NRC 2004, pp. 108–110). This alga now dominates the algal community from June to November, and, because of the high phosphorus concentrations and its

ability to fix nitrogen, is able to reach seasonally high biomass levels that eventually produce highly degraded water quality (Boyd *et al.* 2002, p. 34). As a result of photosynthesis during algal blooms, pH levels increase to stressful levels for fish (Wood *et al.* 2006, p. 1). Once the algal bloom subsides, decomposition of the massive amounts of biomass can lower dissolved oxygen to levels harmful or fatal to fish (Perkins *et al.* 2000, pp. 24–25; Wood *et al.* 2006, p. 1). Additionally, other cyanobacteria (*Microcystis* sp.) may produce toxins harmful to sucker liver tissue (VanderKooi *et al.* 2010, p. 2). Special management considerations or protection are therefore needed to protect water quality from the deleterious effects of algal blooms and may include reducing excess phosphorus concentrations by fencing cattle out of riparian areas, reconfiguring agricultural waterways, increasing riparian stands of vegetation, and restoring wetland habitat that is crucial for filtering sediment and nutrients.

Hydrographs of both Clear Lake Reservoir and Upper Klamath Lake exhibit patterns of a snow-melt-driven system with highest inflows and levels during spring and early summer, although groundwater also is a significant contributor to Upper Klamath Lake (Gannett *et al.* 2007, p. 1). However, Clear Lake Reservoir, Gerber Reservoir, and Upper Klamath Lake are managed to store and divert water for irrigation every year. Clear Lake Reservoir is highly sensitive to drought and downstream water delivery because of its small watershed, low precipitation, minimal groundwater input, and high evaporation rates (NRC 2004, p. 129). In the dry years of 1991 and 1992, the level of Clear Lake Reservoir was drawn down to extremely low levels for irrigation supply (Moyle 2002, p. 201). In 1992, Lost River sucker within Clear Lake Reservoir that were examined exhibited signs of stress, including high rates of parasitism and poor body condition (NRC 2004, p. 132). These signs of stress began to decline as the water level in Clear Lake Reservoir rose in 1993, at the end of the drought (NRC 2004, p. 132).

In 2009, when lake levels were again low due to drought, diversions from Clear Lake Reservoir were halted in mid-summer, and there were no diversions again in 2010 in order to comply with the biological opinion's requirements for minimum lake elevations to avoid harm to listed fish. Likewise, the amount of available larval habitat and suitable shoreline spring spawning habitat in Upper Klamath Lake is significantly affected by even minor changes in lake elevation (Service 2008, p. 79). Therefore, special management considerations or protection are needed to address fluctuations in water levels due to regulated flow and lake elevation management. Special management may include the following actions: Managing bodies of water such that there is minimal flow departure from a natural hydrograph; maintaining, improving, or reestablishing instream flows to improve the quantity of water available for use; and managing groundwater use.

The effects of fluctuations in water levels due to regulated flow management may affect the ability of Lost River sucker and shortnose sucker to access refugia during periods of poor water quality. For example, Pelican Bay appears to act as a key refugium during periods of poor water quality, and efforts to maintain the quality and quantity of the habitat there may be beneficial for suckers (Banish *et al.* 2009, p. 167). Therefore, special management considerations or protections are needed to address access to refugia and may include the following: Maintaining appropriate lake depths to allow access to refugia; restoring degraded habitats to improve quantity of flow at refugia as well as refugia quality; and maintaining or establishing riparian buffers around refugia to improve refugia water quality.

The Klamath Project (Project) stores and later diverts water from Upper Klamath Lake for a variety of Project purposes. These operations result in fluctuating lake levels and flows at the outlet of the lake that differ from historic conditions, some of which increase movement of juvenile fish downstream of Upper Klamath Lake. As such, special management considerations or protection may be needed to address the timing and volume of water that is diverted to maintain sufficient lake elevations.

Throughout the Upper Klamath Lake and Lost River Basin, timber harvesting and associated activities (road building) by Federal, State, tribal, and private landowners have resulted in soil erosion on harvested lands and transport of sediment into streams and rivers adjacent to or downstream from those lands (Service 2002, p. 65; NRC 2004, pp. 65–66). Past logging and road-building practices often did not provide for adequate soil stabilization and erosion control. A high density of forest roads remains in the upper Klamath River basin, and many of these are located near streams where they likely contribute sediment (USFS 2010, p. 7). These sediments result in an increase of fine soil particles that can cover spawning substrata. The major agricultural activity in the upper Klamath River basin, livestock grazing, also has likely led to an increase in sediment and nutrient loading rates by accelerating erosion (Moyle 2002, p. 201; Service 2002, pp. 56, 65; McCormick and Campbell 2007, pp. 6–7). Livestock, particularly cattle, have heavily grazed floodplains, wetlands, forests, rangelands, and riparian areas, and this activity has resulted in the degradation of these areas. Poorly managed grazing operations can alter the streamside riparian vegetation and compact soil surfaces, increasing groundwater runoff, lowering streambank stability, and reducing fish cover.

The increase in sediment accumulation and nutrient loading is consistent with the changes in land use in the upper Klamath River basin occurring over the last century (Bradbury *et al.* 2004, pp. 163–164; Eilers *et al.* 2004, pp. 14–16). Therefore, special management considerations or protection may be required to improve water quality and include: Reducing sediment and nutrient loading by protecting riparian areas from agricultural and forestry impacts, reducing road density to prevent excess sediment loading, and improving cattle management practices.

Lost River sucker and shortnose sucker have limited hydrologic connection to spawning or rearing habitat. For example, lake levels in Clear Lake Reservoir in conjunction with flows in Willow Creek, the sole spawning tributary (Barry *et al.* 2009, p. 3), may adversely affect sucker populations during the spawning migration. Lake levels may be especially pertinent during years when spring runoff is intermediate and flows are sufficient for spawning migration by the suckers, but are not sufficient enough to increase lake elevations substantially during the narrow spawning window. This situation could create a condition in which flow is adequate for both species to spawn but lake elevation precludes suckers ability to access the habitat, although further research is needed to clarify this dynamic. Likewise, the amount of suitable shoreline spring spawning habitat in Upper Klamath Lake is significantly affected by even minor changes in lake elevation, but it is unknown exactly how such levels directly affect annual productivity. Several shoreline spring-spawning populations, including Harriman Springs and Barkley Springs, have been lost or significantly altered

due to railroad construction (Andreasen 1975, pp. 39–40; NRC 2004, p. 228).

Historically, wetlands comprised hundreds of thousands of hectares throughout the range of the species (Gearhart *et al.* 1995, pp. 119–120; Moyle 2002, p. 200; NRC 2004, pp. 72–73), some of which likely functioned as crucial habitat for larvae and juveniles. Other wetlands may have played vital roles in the quality and quantity of water. Loss of ecosystem functions such as these, due to alteration or separation of the habitat, is as detrimental as physical loss of the habitat. Roughly 66–70 percent of the original 20,400 ha (50,400 ac) of wetlands surrounding Upper Klamath Lake was diked, drained, or significantly altered beginning around 1889 (Akins 1970, pp. 73–76; Gearhart *et al.* 1995, p. 2; Larson and Brush 2010, p. 19). Additionally, of the approximately 13,816 ha (34,140 ac) of wetlands connected to Upper Klamath Lake, relatively little functions as rearing habitat for larvae and juveniles, partly due to lack of connectivity with current spawning areas (NRC 2004, pp. 72–73). Therefore, special management considerations or protection may be needed for water quantity to improve access to spawning locations and quality and quantity of wetlands used as rearing habitat. This may be accomplished by: Improving lake level management to allow access to spawning locations during late winter and early spring, restoring access to wetland rearing habitat, and creating wetland rearing habitat adjacent to lakes and reservoirs.

The exotic fish species most likely to affect Lost River sucker and shortnose sucker is the fathead minnow. This species may prey on young Lost River sucker and shortnose sucker and compete with them for food or space (Markle and Dunsmoor 2007, pp. 571–573). For example, fathead minnow were first documented in the upper Klamath River basin in the 1970s and are now the numerically dominant exotic fish in Upper Klamath Lake (Simon and Markle 1997, p. 142; Bottcher and Burdick 2010, p. 40; Burdick and VanderKooi 2010, p. 33). Additional exotic, predatory fishes found in sucker habitats, although typically in relatively low numbers, include yellow perch (*Perca flavescens*), bullhead (*Ameiurus* species), largemouth bass (*Micropterus salmoides*), crappie (*Pomoxis* species), green sunfish (*Lepomis cyanellus*), pumpkinseed (*Lepomis gibbosus*), and Sacramento perch (*Archoplites interruptus*) (NRC 2004, pp. 188–189). In addition to exotic fish species, recent information has shown that American white pelican (*Pelecanus erythrorhynchos*) and double-crested cormorant (*Phalacrocorax auritus*) prey on Lost River sucker and shortnose sucker (Burdick 2012, p. 1). Special management considerations or protection may be needed to protect the forage base from predation by exotic fish species and could be accomplished by the following: Reducing conditions that allow exotic fishes to be successful and restoring conditions that allow Lost River sucker and shortnose sucker to thrive; conducting evaluations to determine methods to remove exotic fish species; determining methods to reduce avian predation; and determining methods to reduce or eliminate competition for the forage base upon which Lost River sucker and shortnose sucker depend to survive.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(1)(A) of the Act, we used the best scientific and commercial data available to designate critical habitat. We reviewed available information pertaining to the habitat requirements of this species. In accordance with the Act and its implementing regulation at 50 CFR 424.12(e), we considered whether designating additional areas—outside those currently occupied as well as those occupied at the time of listing—are necessary to ensure the conservation of the species. We are not designating any areas outside the geographical area occupied by the species because the areas occupied at the time of listing (and which continue to be occupied) are sufficient for the conservation of the species. All units are designated based on sufficient elements of physical and biological features being present to support Lost River sucker and shortnose sucker life-history processes.

In determining which areas to consider as critical habitat, we reviewed the best available scientific data pertaining to the habitat requirements of this species, including information obtained from the Lost River sucker and shortnose sucker Recovery Team and the Recovery Implementation Committee. This review included participation and information from biologists from partner agencies and entities including Federal, State, tribal, and private biologists; experts from other scientific disciplines, such as hydrology and forestry; resource users; and other stakeholders with an interest in Lost River sucker and shortnose sucker and the habitats they depend on for survival or recovery. We also reviewed available data concerning Lost River sucker and shortnose sucker habitat use and preferences; habitat conditions; threats; population demographics; and known locations, distribution, and abundances of Lost River sucker and shortnose sucker. We considered the following criteria in identifying critical habitat:

(1) In determining areas occupied by the Lost River and shortnose sucker to designate as critical habitat, we relied upon principles of conservation biology, including: (a) Representation and resiliency, to ensure sufficient habitat is protected throughout the range of the species to support population viability (e.g., demographic parameters); (b) redundancy, to ensure multiple viable populations are conserved throughout the species' range; and (c) representation, to ensure the representative genetic and life history of suckers (e.g., spring spawning and river spawning) were conserved (Shaffer and Stein 2000, pp. 301–321; Tear *et al.* 2005, p. 841).

(2) Using the conservation biology principles and species-specific habitat needs, we examined the distribution of Lost River sucker and shortnose sucker to determine critical habitat based on the following criteria: (a) Largest occupied areas or populations; (b) most highly connected populations and habitat; (c) areas that can contribute to Lost River sucker and shortnose sucker conservation; and (d) areas with highest conservation potential. We then used these criteria to identify those areas that are necessary to conserve Lost River sucker and shortnose sucker and which also contain the physical or biological features that are essential to the conservation of these species. These criteria reflect the need to protect habitat that can support resilient populations, as well as habitat that supports life-history diversity in the species.

(3) In selecting areas to designate as critical habitat, we considered factors such as size, connectivity to other aquatic habitats, and rangewide recovery considerations, including the importance of spawning and rearing habitat and sufficient water quality (Service 2011). We took into account the fact that Lost River sucker and shortnose sucker habitats include streams used largely for spawning and outmigration; lakes and reservoirs used for rearing, foraging, and migration; and springs used for spawning and refugia.

(4) We examined geographic locations currently occupied by Lost River sucker and shortnose sucker and determined that certain areas did not contain elements essential to the conservation of these species, and we did not consider these areas as essential to the

conservation of the species. Based on the following criteria, such determinations include those areas that have had severe habitat degradation and very low potential for conservation or restoration, areas that do not contribute to connectivity among populations, and areas where Lost River sucker or shortnose sucker populations are not viable; are not connected to spawning habitat; occur in low densities or abundances in very isolated populations; occur only as sink populations; and are greatly impacted by nonnative species.

Based on the preceding criteria, we applied the following methods to identify and map critical habitat:

(1) We identified the geographical areas occupied by Lost River sucker and shortnose sucker at the time of listing that contain the physical and biological features essential for the conservation of the species and which contain one or more of the primary constituent elements identified above. This was done by gathering information from the entities listed above and mapping Lost River sucker and shortnose sucker distribution. As a result of this review, Upper Klamath Lake and its major tributaries, the head of the Klamath River downstream to Iron Gate Dam, Clear Lake and its tributaries, Gerber Reservoir and its tributaries, Tule Lake and the Lost River proper were considered in this assessment.

(2) We used data gathered during the Lost River sucker and shortnose sucker recovery planning process and the Revised Draft Recovery Plan for the Lost River Sucker and Shortnose Sucker (Service 2011), and supplemented those data with recent data developed by State agencies, tribes, the U.S. Forest Service, Bureau of Land Management, and other entities. These data were used to update Lost River sucker and shortnose sucker status and distribution data for purposes of the critical habitat.

(3) For areas where we had data gaps, we solicited expert opinions from knowledgeable fisheries biologists in the local area. Material reviewed included data in reports submitted during section 7 consultations, reports from biologists holding section 10(a)(1)(A) recovery permits, research published in peer-reviewed scientific journals, academic theses, State and Federal government agency reports, and GIS data.

(4) In streams, critical habitat includes the stream channel within the designated stream reach and a lateral extent as defined by the bankfull elevation on one bank to the bankfull elevation on the opposite bank, as well as the distribution information for the Lost River sucker and shortnose sucker. Bankfull is defined as the flow that just fills the stream channel to the top of its nearest banks but below a point where the water begins to overflow onto a floodplain. The lateral extent of critical habitat in lakes and reservoirs is defined by the perimeter of the water body as mapped according to the U.S. Geological Survey 2009 National Hydrography Dataset and distribution information for each species. Land ownership calculations were based on 2011 Oregon and California Bureau of Land Management State office data layers. An updated data layer of Upper Klamath Lake and newly restored wetlands was provided by the USGS, Western Fisheries Research Center, and Klamath Falls Field Station.

(5) When determining critical habitat boundaries within this final rule, we made every effort to avoid including developed areas such as docks and bridges and other structures because such lands lack physical or biological features for Lost River sucker and shortnose sucker. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this final rule have been excluded by text in the rule and are not designated as critical habitat. Therefore, a Federal action involving these lands will not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

The critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document in the rule portion. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which each map is based available to the public on *http://www.regulations.gov* at Docket No. FWS–R8–ES–2011–0097, on our Internet sites *http://www.fws.gov/klamathfallsfwo,* and at the field office responsible for the designation (see **FOR FURTHER INFORMATION CONTACT** above).

We are designating as critical habitat lands that we have determined were occupied at the time of listing and continue to be occupied that contain the physical or biological features to support life-history processes essential to the conservation of the Lost River sucker and shortnose sucker.

Two units were designated for each species based on sufficient elements of physical or biological features being present to support Lost River sucker and shortnose sucker life processes. Some units contained all of the identified elements of physical or biological features and supported multiple life processes. Some segments contained only some elements of the physical or biological features necessary to support the Lost River sucker and shortnose suckers' particular use of that habitat.

Final Critical Habitat Designation

We are designating two units as critical habitat for Lost River sucker and two units as critical habitat for shortnose sucker. The critical habitat areas described below constitute our best assessment at this time of areas that meet the definition of critical habitat. For Lost River sucker, those two units, which were occupied at the time of listing and are still occupied, are: (1) Upper Klamath Lake Unit, including Upper Klamath Lake and tributaries as well as the Link River and Keno Reservoir, and (2) Lost River Basin Unit, including Clear Lake Reservoir and tributaries. For shortnose sucker, those two units, which were occupied at the time of listing and are still occupied, are: (1) Upper Klamath Lake Unit, including Upper Klamath Lake and tributaries as well as the Link River and Keno Reservoir, and (2) Lost River Basin Unit, including Clear Lake Reservoir and tributaries, and Gerber Reservoir and tributaries.

The approximate area of each critical habitat unit is shown in tables 1 through 4.

TABLE 1—AREA OF LAKES AND RESERVOIRS DESIGNATED AS CRITICAL HABITAT FOR LOST RIVER SUCKER

[Area estimates reflect all land within critical habitat unit boundaries]

Critical habitat unit	Land ownership by type	Size of unit in acres (hectares)
1. Upper Klamath Lake	Federal	15,198 (6,151)
	State	533 (216)
	Private/Other	74,684 (30,224)
Unit Total		90,415 (36,590)
2. Lost River Basin	Federal	27,238 (11,023)
	State	0
	Private/Other	194 (79)
Unit Total		27,432 (11,102)
Total		117,848 (47,691)

Note: Area sizes may not sum due to rounding.

TABLE 2—STREAM LENGTH DESIGNATED AS CRITICAL HABITAT FOR LOST RIVER SUCKER

[Area estimates reflect all land within critical habitat unit boundaries]

Critical habitat unit	Land ownership by type	Size of Unit in miles (kilometers)
1. Upper Klamath Lake	Federal	13 (21)
	State	Less than 1
	Private/Other	106 (171)
Unit Total		119 (191)
2. Lost River Basin	Federal	23 (37)
	State	Less than 1
	Private/Other	3 (6)
Unit Total		27 (43)
Total		146 (234)

Note: Area sizes may not sum due to rounding.

TABLE 3—AREA OF LAKES AND RESERVOIRS DESIGNATED AS CRITICAL HABITAT FOR SHORTNOSE SUCKER

[Area estimates reflect all land within critical habitat unit boundaries]

Critical habitat unit	Land ownership by type	Size of unit in acres (hectares)
1. Upper Klamath Lake	Federal	15,198 (6,151)
	State	533 (216)
	Private/Other	74,684 (30,224)
Unit Total		90,415 (36,590)
2. Lost River Basin	Federal	32,051 (12,971)
	State	0
	Private/Other	1,124 (455)
Unit Total		33,175 (13,426)
Total		123,590 (50,015)

Note: Area sizes may not sum due to rounding.

TABLE 4—STREAM LENGTH DESIGNATED AS CRITICAL HABITAT FOR SHORTNOSE SUCKER

[Area estimates reflect all land within critical habitat unit boundaries]

Critical habitat unit	Land ownership by type	Size of unit in miles (kilometers)
1. Upper Klamath Lake	Federal	6 (9)
	State	Less than 1
	Private/Other	41 (66)

TABLE 4—STREAM LENGTH DESIGNATED AS CRITICAL HABITAT FOR SHORTNOSE SUCKER—Continued

[Area estimates reflect all land within critical habitat unit boundaries]

Critical habitat unit	Land ownership by type	Size of unit in miles (kilometers)
Unit Total		47 (76)
2. Lost River Basin	Federal	72 (116)
	State	Less than 1
	Private/Other	16 (26)
Unit Total		89 (143)
Total		136 (219)

Note: Area sizes may not sum due to rounding.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for Lost River sucker and shortnose sucker, below.

Unit 1: Upper Klamath Lake

Lost River Sucker

The Upper Klamath Lake unit is located in south-central Oregon within Klamath County and consists of approximately 90,415 ac (36,590 ha) of lakes and 119 mi (191 km) of rivers. This unit includes Upper Klamath Lake and Agency Lake, together with some wetland habitat; portions of the Williamson and Sprague Rivers; Link River; Lake Ewauna; and the Klamath River from the outlet of Lake Ewauna downstream to Keno Dam. This unit was occupied at the time of listing and contains those physical or biological features essential to the conservation of the Lost River sucker that may require special management or protection. This unit, at least seasonally, contains primary constituent elements 1, 2, and 3. The unit represents the largest population of Lost River sucker and provides redundancy in the number of Lost River sucker populations that are needed for conservation. Additionally, this unit contains areas for both river and spring spawning life histories, which are not known to occur elsewhere throughout the range of the species.

The physical or biological features and the special management or protection they may require include: Maintaining water quality by preventing the deleterious effects of nuisance algal blooms, increased sedimentation, excess nutrients, and other factors affecting water quality; maintaining water quantity to prevent reductions in water levels that may limit access to spawning locations or refugia and reduce the depth of water used as cover, and cause a lack of access to essential rearing habitat (i.e., marsh and wetland areas); maintenance of gravel and cobble substrata to prevent the degradation of spawning, rearing, and adult habitat caused by past land management practices; and protection of the forage base by management of nonnative fish to reduce competition for available forage with Lost River sucker and minimize predation on Lost River sucker.

Shortnose Sucker

The unit is the same as for Lost River sucker, except that it contains only approximately 47 mi (76 km) of streams because shortnose sucker are not known to occur as far upstream as Lost River suckers within the Sprague River. As with the Lost River sucker, this unit also includes the 90,415 ac (36,590 ha) of lakes and reservoirs. This unit was occupied at the time of listing and contains those physical or biological features essential to the conservation of the species and which may require special management or protection. This unit, at least seasonally, contains primary constituent elements 1, 2, and 3. This unit is essential to shortnose sucker conservation because it supports the largest population of shortnose sucker and provides redundancy in the number of shortnose sucker populations that are needed for conservation. Additionally, this unit ensures shortnose sucker are distributed across various habitat types required by different life stages.

The physical or biological features and the special management or protection they may require include: maintaining water quality by preventing the deleterious effects of nuisance algal blooms, increased sedimentation, excess nutrients, and other factors affecting water quality; maintaining water quantity to prevent reductions in water levels that may limit access to spawning locations or refugia and reduce the depth of water used as cover, and cause a lack of access to essential rearing habitat (i.e., marsh and wetland areas); maintenance of gravel and cobble substrata to prevent the degradation of spawning, rearing, and adult habitat caused by past land management practices; and protection of the forage base by management of nonnative fish to reduce competition for available forage with shortnose River sucker and minimize predation on shortnose sucker.

Unit 2: Lost River Basin

Lost River sucker

The Lost River Basin unit is located in south-central Oregon in Klamath and Lake Counties as well as northeastern California in Modoc County and consists of approximately 27,432 ac (11,102 ha) of lake area and 27 mi (43 km) of river length. This unit includes Clear Lake Reservoir and its principal tributary. This unit was occupied at the time of listing and contains those physical or biological features essential to the conservation of the species and which may require special management or protection. This unit, at least seasonally, contains primary constituent elements 1, 2, and 3. This unit supports a large population of Lost River sucker and provides redundancy in the number of Lost River sucker populations that are needed for conservation. Additionally, this unit ensures Lost River sucker are distributed across various habitat types required by different life stages.

The physical or biological features and the special management or protection they may require include: maintaining water quality by preventing the deleterious effects of nuisance algal blooms, increased sedimentation, excess nutrients, and other factors affecting water quality; maintaining water quantity to prevent reductions in water levels that may limit access to spawning locations or refugia and reduce the depth of water used as cover, and cause a lack of access to essential rearing habitat (i.e., marsh and wetland areas); maintenance of gravel and cobble substrata to prevent the degradation of spawning, rearing, and adult habitat caused by past land management

practices; and protection of the forage base by management of nonnative fish to reduce competition for available forage with Lost River sucker and minimize predation on Lost River sucker.

Shortnose Sucker

The unit is the same as for Lost River sucker, but also includes Gerber Reservoir and its principal tributaries. This unit contains approximately 33,175 ac (13,426 ha) of lake area and 88 mi (142 km) of river length. This unit was occupied at the time of listing and contains those physical or biological features essential to the conservation of the species and which may require special management or protection. This unit, at least seasonally, contains primary constituent elements 1, 2, and 3. This unit represents a large population of shortnose sucker and provides redundancy in the number of shortnose sucker populations that are needed for conservation. Additionally, this unit is essential because it ensures shortnose sucker are distributed across various habitat types required by different life stages.

The physical or biological features and the special management or protection they may require include: maintaining water quality by preventing the deleterious effects of nuisance algal blooms, increased sedimentation, excess nutrients, and other factors affecting water quality; maintaining water quantity to prevent reductions in water levels that may limit access to spawning locations or refugia and reduce the depth of water used as cover, and cause a lack of access to essential rearing habitat (i.e., marsh and wetland areas); maintenance of gravel and cobble substrata to prevent the degradation of spawning, rearing, and adult habitat caused by past land management practices; and protection of the forage base by management of nonnative fish to reduce competition for available forage with Lost River sucker and minimize predation on shortnose sucker.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our regulatory definition of ''destruction or adverse modification'' (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F. 3d 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.,* 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local, or private lands that are not federally funded or authorized, do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies sometimes may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that alter the physical or biological features to an extent that appreciably reduces the conservation value of critical habitat for Lost River sucker and shortnose sucker. As discussed above, the role of critical habitat is to support life-history needs of the species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any

proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for the Lost River sucker and shortnose sucker. These activities include, but are not limited to:

(1) Actions that would significantly alter the level of lakes or reservoirs. Such activities could include, but are not limited to, water diversions, groundwater use, or water withdrawals. These activities could reduce the amount of habitat necessary for rearing of larvae and juvenile Lost River sucker and shortnose sucker, preclude access to spawning habitat, reduce or prevent access to refugia, and reduce the amount of water needed to provide the physical and biological features necessary for adult Lost River sucker and shortnose sucker.

(2) Actions that would significantly increase sediment deposition within stream channels. Such activities could include, but are not limited to, livestock grazing that causes excessive sedimentation, road construction, channel alteration, timber harvest and management, off-road vehicle use, and other watershed and floodplain disturbances. These activities could reduce and degrade spawning habitat of Lost River sucker and shortnose sucker by increasing the sediment deposition to deleterious levels.

(3) Actions that would significantly alter lake, reservoir, and/or channel morphology or geometry. Such activities could include, but are not limited to, channelization, impoundment, road and bridge construction, mining, dredging, wetland alteration, and destruction of riparian vegetation. These activities may lead to changes in water flows and levels that would degrade or eliminate Lost River sucker and shortnose sucker habitats. These actions can also lead to increased sedimentation and degradation in water quality to levels that are beyond the tolerances of Lost River sucker and shortnose sucker.

Exemptions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

(1) An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;

(2) A statement of goals and priorities;

(3) A detailed description of management actions to be implemented to provide for these ecological needs; and

(4) A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.''

There are no Department of Defense lands with a completed INRMP within the proposed critical habitat designation. Therefore, we are not exempting lands from this final designation of critical habitat for Lost River sucker and shortnose sucker pursuant to section 4(a)(3)(B)(i) of the Act.

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. The statute on its face, as well as the legislative history, is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor in making that determination.

Under section 4(b)(2) of the Act, the Secretary may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise his discretion to exclude the area only if such exclusion would not result in the extinction of the species.

Exclusions Based on Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we prepared a draft economic analysis of the proposed critical habitat designation and related factors (IEc 2012a). The draft analysis, dated April 17, 2012, was made available for public review from July 26, 2012, through August 27, 2012 (77 FR 43796). Following the close of the comment period, a final analysis (dated September 25, 2012) of the potential economic effects of the designation was developed taking into consideration the public comments and any new information (IEc 2012b).

The intent of the final economic analysis (FEA) is to quantify the economic impacts of all potential conservation efforts for Lost River sucker and shortnose sucker; some of these costs will likely be incurred regardless of whether we designate critical habitat (baseline). The economic impact of the final critical habitat designation is analyzed by comparing scenarios both ''with critical habitat'' and ''without critical habitat.'' The ''without critical habitat'' scenario represents the baseline for the analysis, considering protections already in place for the species (e.g., under the Federal listing and other Federal, State, and local regulations). The baseline, therefore, represents the costs incurred

regardless of whether critical habitat is designated. The ''with critical habitat'' scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat above and beyond the baseline costs; these are the costs we consider in the final designation of critical habitat. The analysis looks retrospectively at baseline impacts incurred since the species was listed, and forecasts both baseline and incremental impacts likely to occur with the designation of critical habitat.

The FEA also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The FEA measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. Finally, the FEA looks retrospectively at costs that have been incurred since 1988 (year of the species' listing) (53 FR 27130), and considers those costs that may occur in the 20 years following the designation of critical habitat, which was determined to be the appropriate period for analysis because limited planning information was available for most activities to forecast activity levels for projects beyond a 20-year timeframe. The FEA quantifies economic impacts of Lost River sucker and shortnose sucker conservation efforts associated with the following categories of activity: (1) Activities affecting water supply—these activities may include water management activities such as dam operation and hydropower production within the reservoirs comprising critical habitat, particularly the Klamath Project on Upper Klamath Lake; (2) activities affecting water quality—these activities may include agricultural activities, including livestock grazing, as well as in-water construction activities; and (3) activities affecting fish passage—these activities may include flood control or water diversions that may result in entrainment or lack of access to spawning habitat.

Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the Lost River sucker and shortnose sucker based on economic impacts.

A copy of the FEA with supporting documents may be obtained by contacting the Klamath Falls Fish and Wildlife Office (see **ADDRESSES**) or by downloading from the Internet at *http://www.regulations.gov* or *http://www.fws.gov/klamathfallsfwo.*

Exclusions Based on National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands owned or managed by the Department of Defense where a national security impact might exist. In preparing this final rule, we have determined that the lands within the designation of critical habitat for Lost River sucker and shortnose sucker are not owned or managed by the Department of Defense, and therefore we anticipate no impact on national security. Consequently, the Secretary is not exercising his discretion to exclude any areas from this final designation based on impacts on national security.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors, including whether the landowners have developed any HCPs or other management plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any tribal issues, and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

In preparing this final rule, we have determined that there are currently no finalized HCPs or other management plans for Lost River sucker and shortnose sucker, and the final designation does not include any tribal lands or tribal trust resources. We anticipate no impact on tribal lands, partnerships, or HCPs from this critical habitat designation. Accordingly, the Secretary is not exercising his discretion to exclude any areas from this final designation based on other relevant impacts.

Required Determinations

Regulatory Planning and Review (Executive Order 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C 801 *et seq.*), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. In this final rule, we are certifying that the critical habitat designation for Lost River sucker and shortnose sucker will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

According to the Small Business Administration, small entities include small organizations, such as

independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; as well as small businesses. Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts on these small entities are significant, we consider the types of activities that might trigger regulatory impacts under this rule, as well as the types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

To determine if the rule could significantly affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities (e.g., water management, grazing, transportation, herbicide and pesticide application, forest management, restoration, or installation of fish passage). We apply the ''substantial number'' test individually to each industry to determine if certification is appropriate. However, the SBREFA does not explicitly define ''substantial number'' or ''significant economic impact.'' Consequently, to assess whether a ''substantial number'' of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the number of small entities potentially affected, we also consider whether their activities have any Federal involvement.

Designation of critical habitat only affects activities authorized, funded, or carried out by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the species is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they authorize, fund, or carry out that may affect the Lost River sucker and shortnose sucker. Federal agencies also must consult with us if their activities may affect critical habitat. Designation of critical habitat, therefore, could result in an additional economic impact on small entities due to the requirement to reinitiate consultation for ongoing Federal activities (see *Application of the ''Adverse Modification Standard''* section).

In our final economic analysis of the critical habitat designation, we evaluated the potential economic effects on small business entities resulting from conservation actions related to the listing of the Lost River sucker and shortnose sucker and the designation of critical habitat. The analysis is based on the estimated impacts associated with the rulemaking as described in Chapters 4 through 5 and Appendix A of the analysis and evaluates the potential for economic impacts related to: (1) Activities affecting water supply—these activities may include water management activities such as dam operation and hydropower production within the reservoirs comprising critical habitat, particularly the Klamath Project on Upper Klamath Lake; (2) activities affecting water quality—these activities may include agricultural activities, including livestock grazing, as well as in-water construction activities; and (3) activities affecting fish passage—these activities may include flood control or water diversions that may result in entrainment or lack of access to spawning habitat.

Small entities may participate in section 7 consultation as a third party (the primary consulting parties being the Service and the Federal action agency). It is therefore possible that the small entities may spend additional time considering critical habitat during section 7 consultation for the suckers. Additional incremental costs of consultation that would be borne by the Federal action agency and the Service are not relevant to this screening analysis as these entities (Federal agencies) are not small.

Chapter 4 of the FEA projects section 7 consultations associated with seven types of activities. Of these activities, small entities are not anticipated to incur incremental costs associated with water management, transportation, herbicide and pesticide application, forest management, restoration, or installation of fish passage. As described in Chapter 4, impacts to these activities are expected to be incurred largely by Federal and State agencies, including the Bureau of Reclamation, Oregon Department of Transportation, the Federal Highway Administration, the Federal Aviation Administration, the Forest Service, the Bureau of Land Management, and the Klamath Basin National Wildlife Refuge. The analysis does forecast that PacifiCorp will engage in two section 7 consultations related to its HCP. However, PacifiCorp not a small entity.

The FEA focused its analysis on the incremental impacts associated with section 7 consultation on grazing activities, which may be borne by small entities. Across the study area, which includes the 3 counties overlapping the proposed critical habitat designation, 125 businesses are engaged in the beef cattle ranching and farming industry. Of these, 121, or 97 percent, have annual revenues at or below the small business threshold of $750,000, and thus are considered small (see Exhibit A–1 of the FEA). A section 7 consultation on grazing activity may cover one or more grazing allotments, and a small entity may be permitted to graze on one or more of these allotments. Because the number of allotments and grazing permittees varies from consultation to consultation, this analysis makes the simplifying assumption that 1 small entity is affected in each of the 20 allotments adjacent to proposed critical habitat. These 20 small entities represent approximately 16.5 percent of small grazers across the study area.

The total annualized impacts to the 20 entities that may incur administrative costs is approximately $24,600, with annualized impacts of $2,170. Assuming 20 affected small entities and that each entity has annual revenues of $132,000, these annualized impacts per small entity are expected to comprise 0.08 percent of annual revenues.

In summary, we considered whether this designation would result in a significant economic effect on a substantial number of small entities. Based on the above reasoning and currently available information, we concluded that this rule would not result in a significant economic impact on a substantial number of small entities. Therefore, we are certifying that the designation of critical habitat for Lost River sucker and shortnose sucker will not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. OMB

has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute ''a significant adverse effect'' when compared to not taking the regulatory action under consideration.

The economic analysis finds that none of these criteria are relevant to this analysis. Thus, based on information in the economic analysis, energy-related impacts associated with Lost River sucker and shortnose sucker conservation activities within critical habitat are not expected. As such, the designation of critical habitat is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(1) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule will significantly or uniquely affect small governments because it would not produce a Federal mandate of $100 million or greater in any year; that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The FEA concludes incremental impacts may occur due to administrative costs of section 7 consultations for water management, grazing, transportation, herbicide and pesticide application, forest management, restoration, or installation of fish passage; however, these impacts are not expected to significantly affect small governments. Consequently, we do not believe that the critical habitat designation would significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with Executive Order 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for Lost River sucker and shortnose sucker in a takings implications assessment. As discussed above, the designation of critical habitat affects only Federal actions. Although private parties that receive Federal funding, assistance, or require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. We believe that the takings implications associated with this critical habitat designation will be insignificant, in part, because only lands that are considered occupied by the Lost River sucker and shortnose sucker are being included in the designation. While private property owners may experience impacts from this designation of critical habitat related to activities requiring a Federal permit (e.g., an individual requiring a permit from the U.S. Army Corps of Engineers to develop a retaining wall or boat dock within critical habitat) they are not expected to be significant. With the exception of some new consultations and additional administrative costs related to addressing critical habitat in future consultation efforts, future impacts related to section 7 consultations and project modifications are expected to remain largely the same or fewer than they have in the past. The takings implications assessment concludes that this designation of critical habitat for Lost River sucker and shortnose sucker does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with Executive Order 13132 (Federalism), this rule does not have significant Federalism effects. A federalism impact summary statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this critical habitat designation with appropriate State resource agencies in California and Oregon. We received comments from the Oregon Department of Fish and Wildlife and have addressed them in the Summary of Comments and Recommendations section of the rule. The designation of critical habitat in areas currently occupied by the Lost River sucker and shortnose sucker imposes nominal additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities The designation of critical habitat in areas currently occupied by the Lost River sucker and shortnose sucker may impose nominal additional regulatory restrictions to those currently in place and, therefore, may have some incremental impact on State and local governments and their

activities. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the applicable standards set forth in sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act. This final rule uses standard property descriptions and identifies the elements of physical or biological features essential to the conservation of the Lost River sucker and shortnose sucker within the designated areas to assist the public in understanding the habitat needs of the species.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. We determined that there are no tribal lands occupied by the Lost River sucker and shortnose sucker at the time of listing that contain the features essential for conservation of the species, and no tribal lands unoccupied by the Lost River sucker and shortnose sucker that are essential for the conservation of the species. Therefore, we are not designating critical habitat for the Lost River sucker and shortnose sucker on tribal lands.

References Cited

A complete list of all references cited is available on the Internet at *http://www.regulations.gov* and upon request from the Klamath Falls Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Author(s)

The primary authors of this rulemaking are the staff members of the Klamath Falls Fish and Wildlife Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. Amend § 17.11(h) by revising the entry for ''Sucker, Lost River'' and ''Sucker, shortnose'' under ''Fishes'' in the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	
FISHES							
*	*	*	*	*	*	*	
Sucker, Lost River ...	*Deltistes luxatus*	U.S.A. (CA, OR)	Entire	E	313	17.95(e)	NA
*	*	*	*	*	*	*	
Sucker, shortnose ...	*Chasmistes brevirostris*.	U.S.A. (CA, OR)	Entire	E	313	17.95(e)	NA
*	*	*	*	*	*	*	

■ 3. In § 17.95, amend paragraph (e) by adding an entry for ''Lost River Sucker (*Deltistes luxatus*)'' and an entry for ''Shortnose Sucker (*Chasmistes brevirostris*)'', in the same order that these species appear in the table at § 17.11(h), to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(e) *Fishes.*

* * * * *

Lost River Sucker (*Deltistes luxatus*)

(1) Critical habitat units are depicted for Klamath and Lake Counties, Oregon, and Modoc County, California, on the maps below.

(2) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of Lost River sucker consist of three components:

(i) *Water.* Areas with sufficient water quantity and depth within lakes, reservoirs, streams, marshes, springs, groundwater sources, and refugia habitats with minimal physical, biological, or chemical impediments to connectivity. Water must have varied depths to accommodate each life stage: Shallow water (up to 3.28 ft (1.0 m)) for larval life stage, and deeper water (up to 14.8 ft (4.5 m)) for older life stages. The water quality characteristics should include water temperatures of less than 82.4 °Fahrenheit (28.0 °Celsius); pH less than 9.75; dissolved oxygen levels greater than 4.0 mg per L; low levels of microcystin; and un-ionized ammonia (less than 0.5 mg per L). Elements also include natural flow regimes that provide flows during the appropriate time of year or, if flows are controlled, minimal flow departure from a natural hydrograph.

(ii) *Spawning and rearing habitat.* Streams and shoreline springs with gravel and cobble substrate at depths typically less than 4.3 ft (1.3 m) with adequate stream velocity to allow spawning to occur. Areas containing emergent vegetation adjacent to open water, provides habitat for rearing and facilitates growth and survival of suckers, as well as protection from predation and protection from currents and turbulence.

(iii) *Food.* Areas that contain an abundant forage base, including a broad array of chironomidae, crustacea, and other aquatic macroinvertebrates.

(3) Critical habitat does not include manmade structures (such as docks and bridges) and the land on which they are located existing within the legal boundaries on January 10, 2013.

(4) *Critical habitat map units.* Data layers defining map units were created on a base of the U.S. Geological Survey 2009 National Hydrography Dataset, and critical habitat was then mapped using North American Datum (NAD) 83, Universal Transverse Mercator Zone 10N coordinates. The maps in this entry establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's Internet site, *http://www.fws.gov/klamathfallsfwo,* at *http://www.regulations.gov* at Docket No. FWS–R8–ES–2011–0097, and at the field office responsible for the designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) **Note:** An index map for designated critical habitat units for the Lost River sucker follows:

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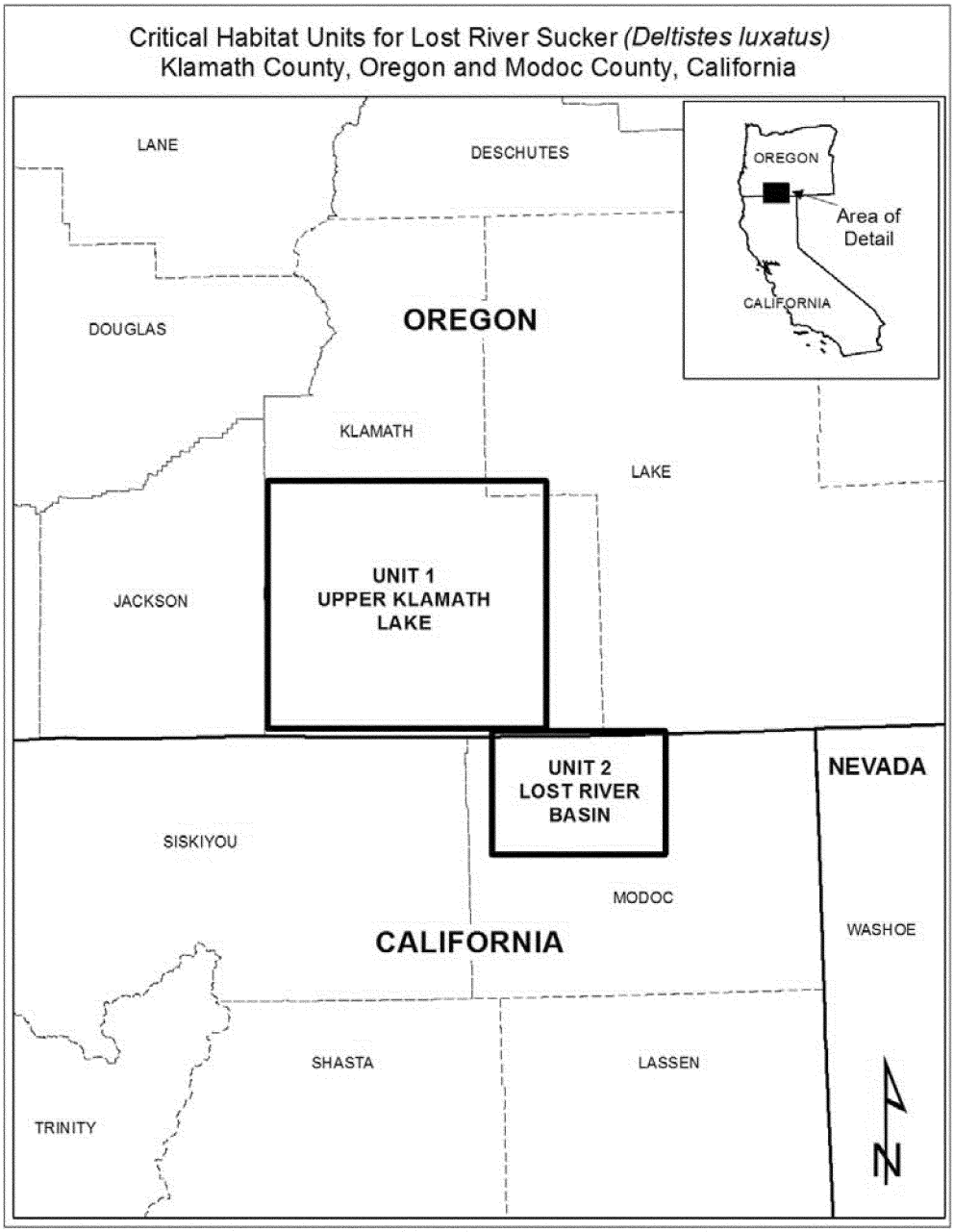
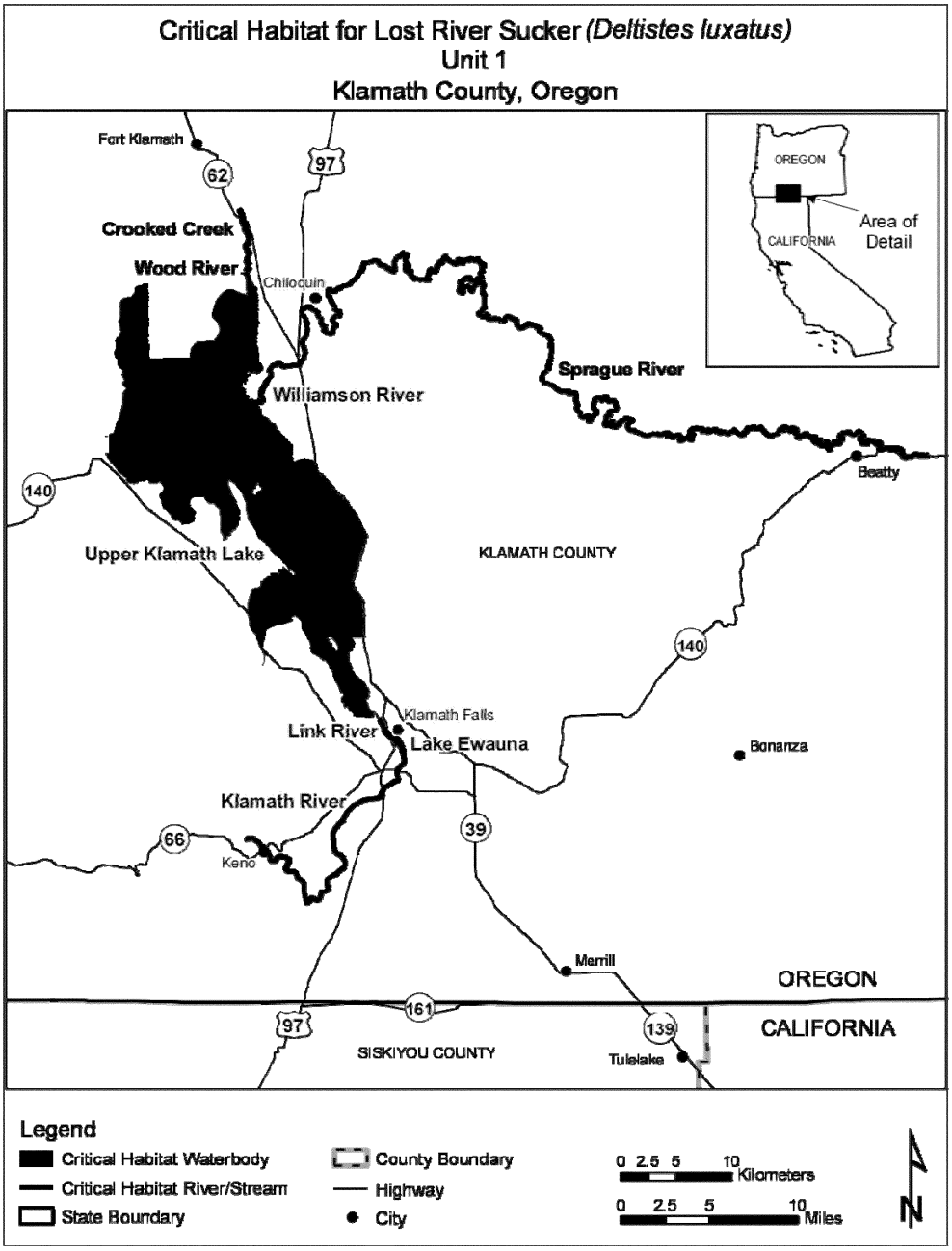
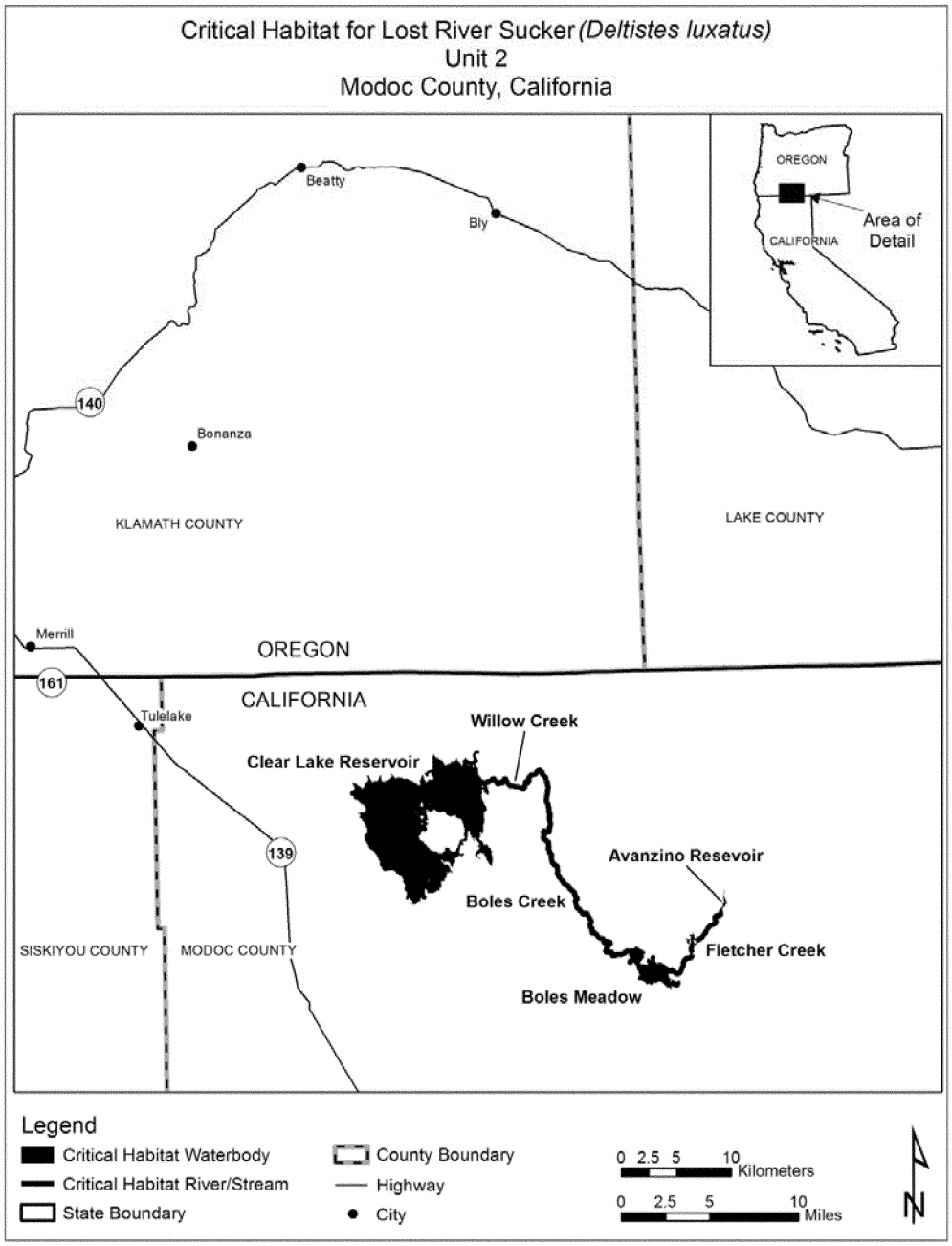


(6) Unit 1: Upper Klamath Lake Unit, Klamath County, Oregon. **Note:** Map of Unit 1, Upper Klamath Lake Unit, of critical habitat for Lost River sucker follows:



(7) Unit 2: Lost River Basin Unit, Klamath County, Oregon. **Note:** Map of Unit 2, Lost River Basin Unit, of critical habitat for Lost River sucker follows:



* * * * *

Shortnose Sucker (*Chasmistes brevirostris*)

(1) Critical habitat units are depicted for Klamath and Lake Counties, Oregon, and Modoc County, California, on the maps below.

(2) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of shortnose sucker consist of three components:

(i) *Water.* Areas with sufficient water quantity and depth within lakes, reservoirs, streams, marshes, springs, groundwater sources, and refugia habitats with minimal physical, biological, or chemical impediments to connectivity. Water must have varied depths to accommodate each life stage: Shallow water (up to 3.28 ft (1.0 m)) for juveniles, and deeper water (up to 14.8 ft (4.5 m)) for adults. The water quality characteristics should include water temperatures of less than 82.4 °F (28.0 °Celsius); pH less than 9.75; dissolved oxygen levels greater than 4.0 mg per L; low levels of microcystin; and un-ionized ammonia (less than 0.5 mg per L). Elements also include natural flow regimes that provide flows during the appropriate time of year or, if flows are controlled, minimal flow departure from a natural hydrograph.

(ii) *Spawning and rearing habitat.* Streams and shoreline springs with gravel and cobble substrate at depths typically less than 4.3 ft (1.3 m) with adequate stream velocity to allow spawning to occur. Areas containing

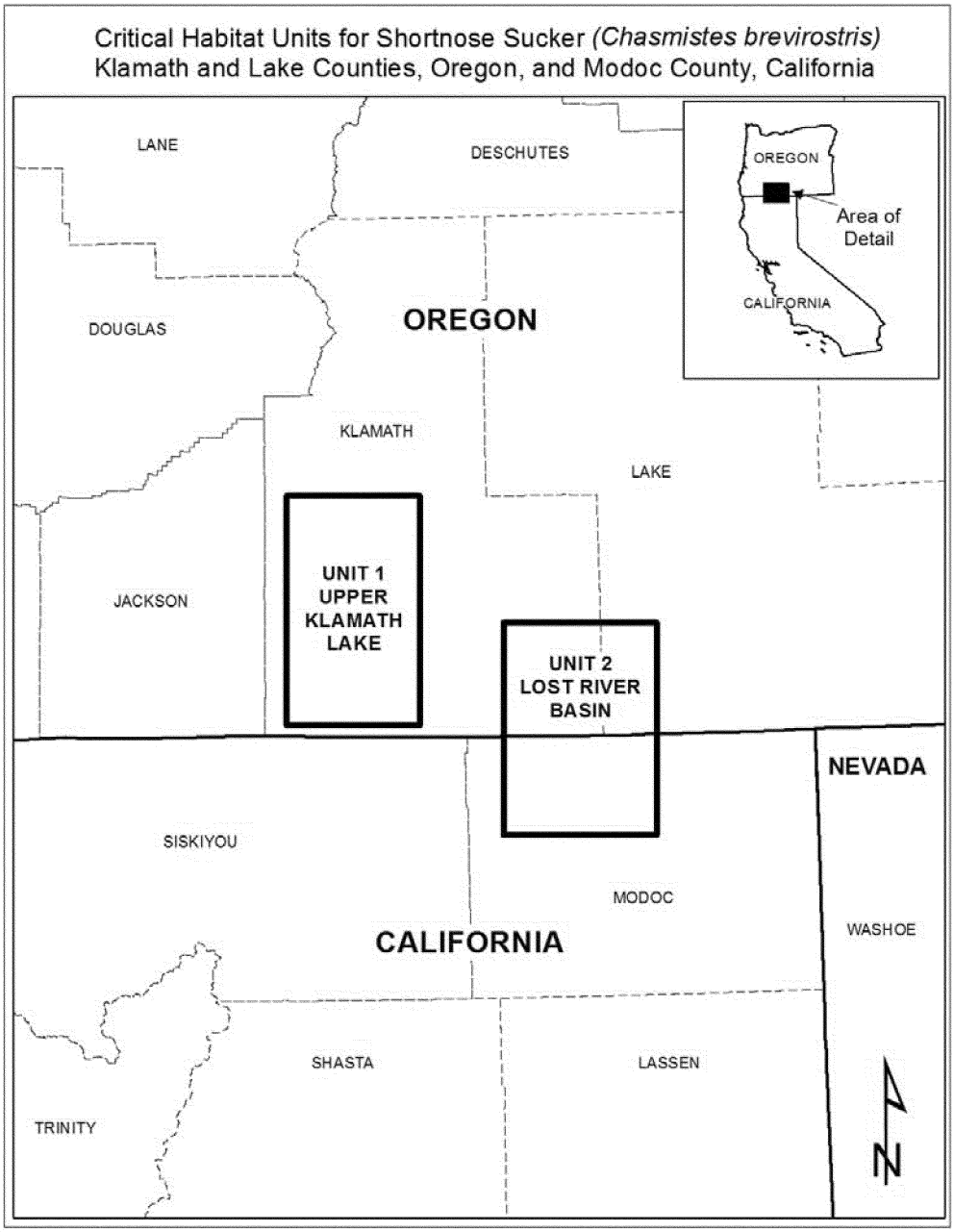
emergent vegetation adjacent to open water provides habitat for rearing and facilitates growth and survival of suckers, as well as protection from predation and protection from currents and turbulence.

(iii) *Food.* Areas that contain an abundant forage base, including a broad array of chironomidae, crustacea, and other aquatic macroinvertebrates.

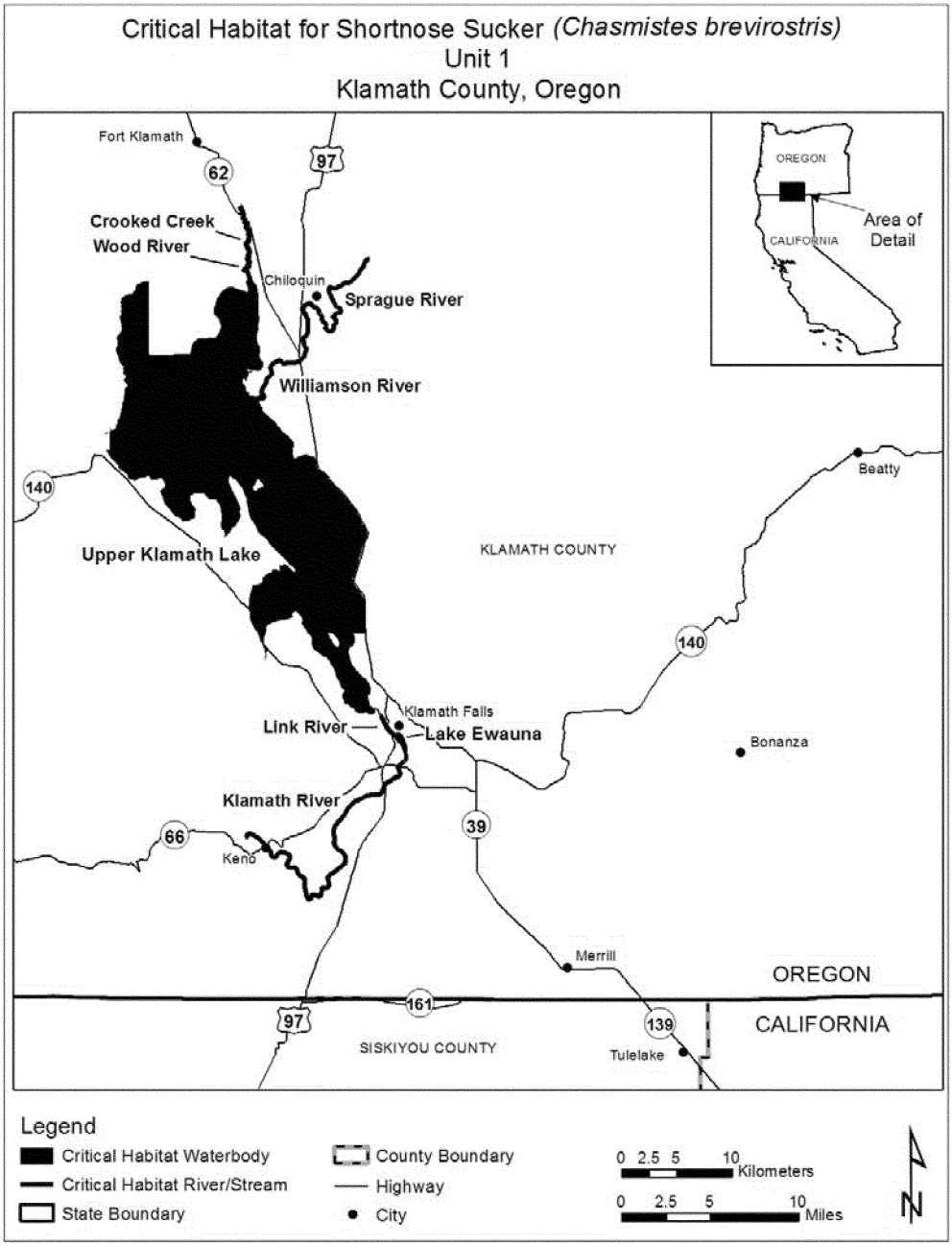
(3) Critical habitat does not include manmade structures (such as docks and bridges) and the land on which they are located existing within the legal boundaries on January 10, 2013.

(4) *Critical habitat map units.* Data layers defining map units were created on a base of the U.S. Geological Survey 2009 National Hydrography Dataset, and critical habitat was then mapped using North American Datum (NAD) 83, Universal Transverse Mercator Zone 10N coordinates. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's internet site, *http://www.fws.gov/klamathfallsfwo,* at *http://www.regulations.gov* at Docket No. FWS–R8–ES–2011–0097, and at the field office responsible for the designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

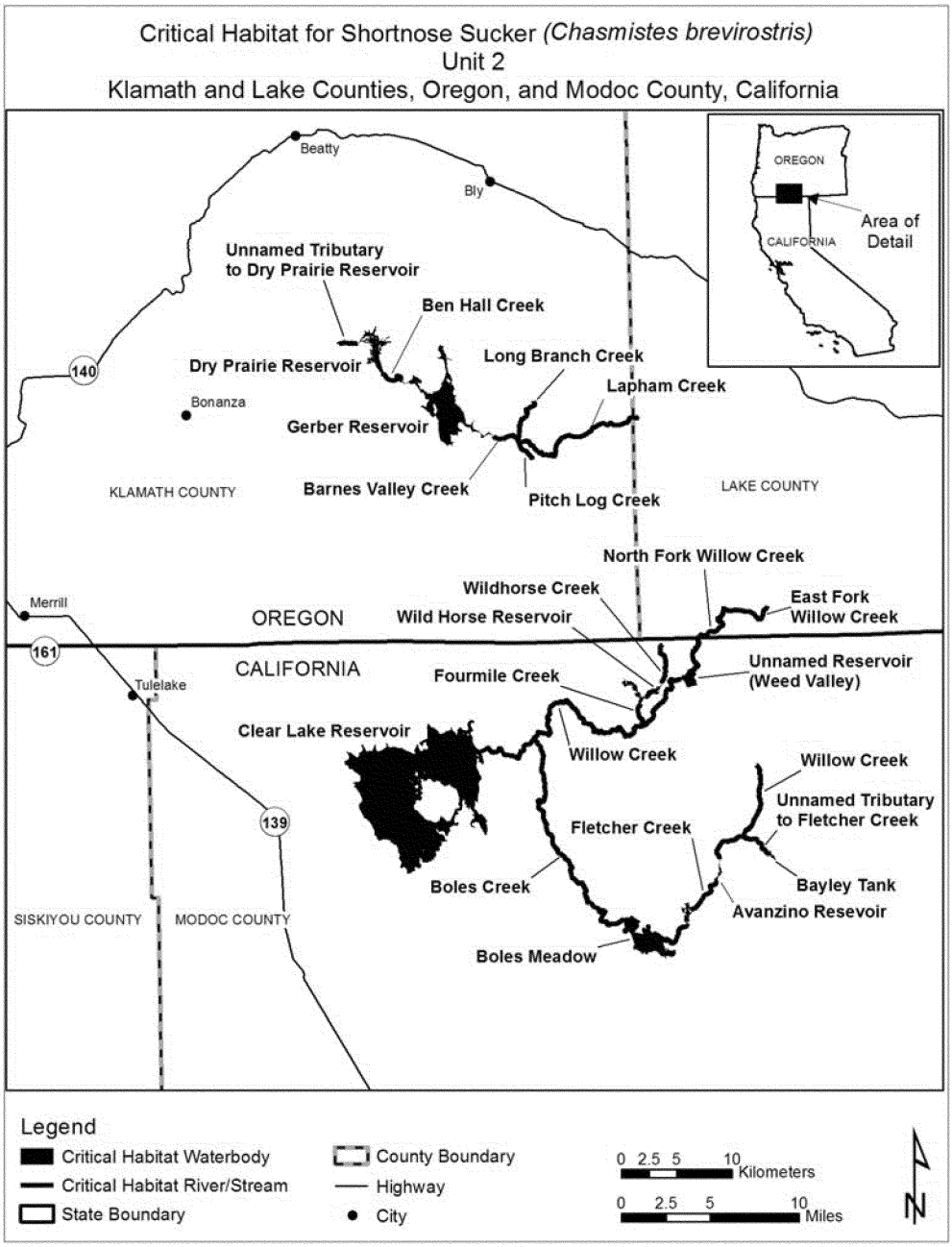
(5) **Note:** An index map for designated critical habitat units for the Lost River sucker follows:



(6) Unit 1: Upper Klamath Lake Unit, Klamath County, Oregon. **Note:** Map of Unit 1, Upper Klamath Lake Unit, of critical habitat for shortnose sucker follows:



(7) Unit 2: Lost River Basin Unit, Klamath County, Oregon. **Note:** Map of Unit 2, Lost River Basin Unit, of critical habitat for shortnose sucker follows:



* * * * *

Dated: November 20, 2012.

Rachel Jacobson,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2012–29332 Filed 12–10–12; 8:45 am]

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No. 238 December 11, 2012

Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Listing Four Subspecies of Mazama Pocket Gopher and Designation of Critical Habitat; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R1–ES–2012–0088; 4500030113]

RIN 1018–AZ17

Endangered and Threatened Wildlife and Plants; Listing Four Subspecies of Mazama Pocket Gopher and Designation of Critical Habitat

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, propose to list four subspecies of Mazama pocket gopher (Olympia, Tenino, Yelm, and Roy Prairie) as threatened species under the Endangered Species Act of 1973, as amended (Act). We additionally propose to designate critical habitat for these subspecies. We have determined that the Tacoma pocket gopher is extinct, and that the listing of three other subspecies of Mazama pocket gopher (Shelton, Cathlamet, and Olympic) is not warranted. These determinations fulfill our obligations under a settlement agreement. These are proposed regulations, and if finalized, the effect of these regulations will be to add these species to the List of Endangered and Threatened Wildlife and to designate critical habitat under the Endangered Species Act.

DATES: We will accept comments received or postmarked on or before February 11, 2013. We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by January 25, 2013.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter Docket No. FWS–R1–ES–2012–0088, which is the docket number for this rulemaking. You may submit a comment by clicking on ''Comment Now!''.

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R1–ES–2012–0088; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

The coordinates or plot points or both from which the critical habitat maps are generated are included in the administrative record for this rulemaking and are available at *http://www.fws.gov/wafwo/*, *http://www.regulations.gov* at Docket No. [FWS–R1–ES–2012–0088], and at the Washington Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). Any additional tools or supporting information that we may develop for this rulemaking will also be available at the Fish and Wildlife Service Web site and Field Office set out above, and may also be included in the preamble and/or at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Ken S. Berg, Manager, Washington Fish and Wildlife Office, 510 Desmond Drive, Lacey, WA 98503, by telephone (360) 753–9440, or by facsimile (360) 534–9331. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Endangered Species Act (Act), a species may warrant protection through listing if it is an endangered or threatened species throughout all or a significant portion of its range. The subspecies addressed in this proposed rule are candidates for listing and, by virtue of a settlement agreement, we must make a determination as to their present status under the Act. These status changes can only be done by issuing a rulemaking. The table below summarizes our determination for each of these candidate species:

Species		Present range	Status
Thurston/Pierce subspecies of Mazama pocket gopher.	*Thomomys mazama* ssp. *glacialis, pugetensis, tumuli, yelmensis.*	Pierce and Thurston Counties, WA.	Proposed Threatened.
Olympic pocket gopher	*Thomomys mazama melanops*	Clallam County, WA	Not warranted.
Brush Prairie pocket gopher	*Thomomys talpoides douglasii*	Clark County, WA	Removed due to error.
Cathlamet pocket gopher	*Thomomys mazama louiei*	Wahkiakum County, WA	Not warranted.
Tacoma pocket gopher	*Thomomys mazama tacomensis*	Extinct	Extinct.
Shelton pocket gopher	*Thomomys mazama couchi*	Mason County, WA	Not warranted.

The basis for our action. Under the Endangered Species Act, we may determine that a species is an endangered or threatened species based on any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

For those subspecies for which we are proposing listing, we have determined that these subspecies are impacted by one or more of the following factors to the extent that the subspecies meet the definition of an endangered or threatened species under the Act:

- Habitat loss through conversion and degradation of habitat, particularly from agricultural and urban development, successional changes to grassland habitat, military training, and the spread of invasive plants;
- Disease;
- Predation;
- Inadequate existing regulatory mechanisms that allow significant threats such as habitat loss; and
- Other natural or manmade factors, including low genetic diversity, small or isolated populations, low reproductive success, declining population or subpopulation sizes, and control as a pest species.

In this rule we propose to designate critical habitat for these species. We are proposing to designate approximately 9,234 ac (3,737 ha) as critical habitat for the four Thurston/Pierce subspecies of Mazama pocket gopher (Olympia, Tenino, Yelm, and Roy Prairie) in Washington.

The basis for our action. Under the Endangered Species Act, we are required to designate critical habitat for any species that is determined to be endangered or threatened. We are required to base the designation on the best available scientific data after taking into consideration economic, national

security, and other relevant impacts. An area may be excluded from the final designation of critical habitat if the benefits of exclusion outweigh the benefits of designation, unless the exclusion will result in the extinction of the subspecies.

We are proposing to promulgate special rules. We are considering whether to exempt from the Act's take prohibitions (at section 9), existing maintenance activities and agricultural practices located on private lands where Mazama pocket gophers occur. The intent of this special rule would be to increase support for the conservation of Mazama pocket gophers and provide an incentive for continued management activities that benefit the four Thurston/Pierce subspecies and their habitats.

We are preparing an economic analysis. To ensure that we fully consider the economic impacts, we are preparing a draft economic analysis of the proposed designations of critical habitat. We will publish an announcement and seek public comments on the draft economic analysis when it is completed.

We will seek peer review. We are seeking comments from knowledgeable individuals with scientific expertise to review our technical assumptions, analysis of the best available science, and application of that science or to provide any additional scientific information to improve these proposed rules. Because we will consider all comments and information received during the comment period, our final determinations may differ from this proposal.

We are seeking public comment on this proposed rule. Anyone is welcome to comment on our proposal or provide additional information on the proposal that we can use in making a final determination on the status of this species. Please submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. Within 1 year following the publication of this proposal, we will publish in the **Federal Register** a final determination concerning the listing of the subspecies and the designation of their critical habitat or withdraw the proposal if new information is provided that supports that decision.

Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from the public, other concerned governmental agencies, Native American tribes, the scientific community, industry, or any other interested parties concerning this proposed rule. We particularly seek comments concerning:

(1) The subspecies' biology, range, and population trends, including:

(a) Habitat requirements for feeding, breeding, and sheltering;

(b) Genetics and taxonomy;

(c) Historical and current range including distribution patterns;

(d) Historical and current population levels, and current and projected trends; and

(e) Past and ongoing conservation measures for the subspecies, their habitat or both.

(2) The factors that are the basis for making a listing determination for the four subspecies under section 4(a) of the Act (16 U.S.C. 1531 *et seq.*), which are:

(a) The present or threatened destruction, modification, or curtailment of the subspecies' habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting the subspecies' continued existence.

(3) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to these subspecies and existing regulations that may be addressing those threats;

(4) Additional information concerning the historical and current status, range, distribution, and population size of these subspecies, including the locations of any additional populations of these subspecies;

(5) Any information on the biological or ecological requirements of the four subspecies, and ongoing conservation measures for the subspecies and their habitat;

(6) The reasons why we should or should not designate areas as ''critical habitat'' under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to the four subspecies from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat may not be prudent.

(7) Specific information on:

(a) The amount and distribution of habitat for the four Thurston/Pierce subspecies of Mazama pocket gopher;

(b) What areas that were occupied at the time of listing (or are currently occupied) and that contain features essential to the conservation of the subspecies should be included in the designation and why;

(c) Special management considerations or protection that may be needed in critical habitat areas we are proposing; and

(d) What areas not occupied at the time of listing are essential for the conservation of the subspecies and why.

(8) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(9) Information on the projected and reasonably likely impacts of climate change on the four Thurston/Pierce subspecies of Mazama pocket gopher.

(10) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation; in particular, any impacts on small entities or families, and the benefits of including or excluding areas that exhibit these impacts.

(11) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(12) Additional information pertaining to the promulgation of a special rule to exempt from the section 9 take prohibitions existing maintenance activities and agricultural practices on private lands, including airports, where the four Thurston/Pierce subspecies of Mazama pocket gopher occur.

(13) Whether the Brush Prairie pocket gopher, which the Service believes was added to the candidate list in error and without basis, should be removed from the candidate list.

(14) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

Please note that submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is a threatened or endangered species must be made ''solely on the basis of the best scientific and commercial data available.''

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We request that you send comments only by the methods described in the **ADDRESSES** section.

If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.* Please include sufficient information with your comments to allow us to verify any scientific or commercial information you include.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Washington Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

Candidate History

We first identified eight subspecies of Mazama pocket gophers (Shelton, Roy Prairie, Cathlamet, Olympic, Olympia, Tacoma, Tenino, and Yelm) in Washington as candidates for listing in the 2001 Notice of Review of Native Species that are Candidates for Listing as Endangered or Threatened (CNOR) (66 FR 54808, October 30, 2001). All candidate species are assigned listing priority numbers (LPN) that are based on the immediacy and magnitude of threats and taxonomic status. In 2001, all eight subspecies of Mazama pocket gopher were assigned an LPN of 6, which reflects threats of a high magnitude that are not considered imminent.

In 2005, the LPN for the eight Washington subspecies of Mazama pocket gopher was revised to 3 in response to imminent threats including commercial and residential development and the operation of gravel pits (70 FR 24870; May 11, 2005) on gopher habitat. In our 2007 CNOR (72 FR 69034, December 6, 2007), we added the Brush Prairie pocket gopher to the list of candidate species, because at that time it was believed to be a subspecies of Mazama pocket gopher based on genetic data and morphological features. The candidate status for the nine Washington subspecies of Mazama pocket gopher was most recently reaffirmed in the October 26, 2011, CNOR (76 FR 66370). The U.S. Fish and Wildlife Service (Service) completed action plans for the nine Washington subspecies of Mazama pocket gophers and set conservation targets and identified actions to achieve those targets over the next 5 years. The action plan can be found on the Service's Web site at: *http://ecos.fws.gov/docs/action_plans/doc3085.pdf* (Mazama pocket gopher).

Petition History

In 2001, we developed an internal, discretionary candidate assessment document for the Washington subspecies of Mazama pocket gopher. This candidate assessment was published in the **Federal Register** on October 30, 2001 (USFWS 2001). On December 10, 2002, we received a petition from the Center for Biological Diversity and the Northwest Ecosystem Alliance to list the eight subspecies of Mazama pocket gophers endemic to Washington State as endangered species. The petitioners also requested that critical habitat be designated concurrent with the listing. Because the Service had already determined that these subspecies of Mazama pocket gopher warranted listing and placed them on the candidate list in 2001, we have been evaluating these subspecies as resubmitted petition findings on an annual basis. On July 12, 2011, the Service filed a multiyear work plan as part of a proposed settlement agreement with the Center for Biological Diversity and others, in a consolidated case in the U.S. District Court for the District of Columbia. The settlement agreement was approved by the court on September 9, 2011, and will enable the Service to systematically review and address the conservation needs of more than 250 candidate species over a period of 6 years, including the Washington State Mazama pocket gopher subspecies. This proposed rule fulfills, in part, the terms of that settlement agreement.

Background

We discuss below only those topics directly relevant to the proposed listing of the Washington State Mazama pocket gopher subspecies in this section of the proposed rule.

Species Information

Although the species *Thomomys mazama,* or Mazama pocket gopher, includes numerous subspecies that are found in the States of Washington, Oregon, and California (as described below in Taxonomy), only the Mazama pocket gopher subspecies found in the State of Washington are currently candidates for listing under the Act. In this document, when we use the general term ''Mazama pocket gopher'' we are referring collectively to only those subspecies of *Thomomys mazama* that occur in the State of Washington; as used here, ''Mazama pocket gopher'' is not intended to include any subspecies of *T. mazama* that occur in the States of Oregon or California.

Adult Mazama pocket gophers are reddish brown to black above, and the underparts are lead-colored with buff-colored tips. The lips, nose, and patches behind the ears are black; the wrists are white. Adults range from 7 to 11 inches (in) (175 to 273 millimeters (mm)) in total length, with tails that range from 2 to 3 in (45 to 85 mm) (Hall 1981, p. 465). In Washington, Mazama pocket gophers are found west of the Cascade Mountain Range from the Olympic Mountains south through the Puget Sound trough, with an additional single locality known from Wahkiakum County (Verts and Carraway 2000, p. 3). Their populations are concentrated in well-drained friable soils often associated with glacial outwash. Mazama pocket gophers reach reproductive age in the spring of the year after their birth and produce litters between spring and early summer. Litter size ranges from one to nine (Wight 1918, p. 14), with an average of four (Verts and Carraway 2000, p. 3).

Taxonomy

The Mazama pocket gopher complex consists of 15 subspecies, 8 of which occur only in Washington, 5 of which occur only in Oregon, 1 that occurs only in California, and 1 subspecies with a distribution that spans the boundary between Oregon and California (Hall 1981, p. 467). The first pocket gophers collected in western Washington were considered to be subspecies of the northern pocket gopher (*Thomomys talpoides*) (Goldman 1939), until 1960 when the complex of pocket gophers found in western Washington was determined to be more similar to the western pocket gopher (*T. mazama*) based on characteristics of the baculum (penis bone) (Johnson and Benson 1960, p. 20). Eight western Washington subspecies of Mazama pocket gopher (*T. mazama,* ssp. *couchi, glacialis, louiei, melanops, pugetensis, tacomensis, tumuli,* and *yelmensis)* have been identified (Hall 1981, p. 467). *Thomomys mazama* is recognized as a valid species by the Integrated Taxonomic Information System (ITIS)

(ITIS 2012b); however, the ITIS Web site does not designate these taxa to the subspecies level.

Although there have been some suggestions that potential changes to the classification of some of these subspecies may be considered, as discussed below, we have no information to suggest that any of the presently recognized subspecies are the subject of serious dispute. We consulted with Alfred Gardner, Curator of North American mammals, Smithsonian Institution, National Museum of Natural History, who identified the Mammalian Species Account #641 of the American Society of Mammalogists, authored by Verts and Carraway (2000), as the definitive text for this taxon (Gardner 2012, pers. comm.). Thus we follow the subspecies designations of Verts and Carraway (2000) in this finding, as this text represents the currently accepted taxonomy for the species *Thomomys mazama.*

While past descriptions of Mazama pocket gophers have focused on morphological differences in characteristics such as pelage color, skull features, and body size (Bailey 1915; Taylor 1919; Goldman 1939; Dalquest and Scheffer 1942; Dalquest and Scheffer 1944a, b; Gardner 1950; Hall 1981, pp. 465–466), recent genetic evaluations have been conducted on the Mazama pocket gopher complex using mitochondrial deoxyribonucleic acid (mtDNA) sequencing of the cytochrome b gene (Welch 2008). From these and subsequent data, Welch and Kenagy (2008, pp. 6–7) determined that the Mazama pocket gopher complex in Washington is geographically structured into three haplotype clades (genetic groups) representing the following three localities: (1) Olympic Peninsula (Clade A, which includes the Olympic pocket gopher); (2) Mason County (Clade B, which includes the Shelton pocket gopher), and (3) Thurston and Pierce county (Clade C, which includes the Roy Prairie, Olympia, and Yelm pocket gophers).

Specimens from the subspecies *Thomomys mazama louiei* (Wahkiakum County) were unobtainable and as such were omitted from Welch and Kenagy's (2008, pp. 1–3) analysis, so it is unknown what clade the Cathlamet pocket gopher belongs to or if it occupies its own clade. In addition, no specimens from the subspecies *T. m. tumuli* (Tenino pocket gopher) were readily available and were also not included in the analysis. None of the haplotypes in the analyzed specimens were shared between the three clades, which supports the differentiation of the clades. The mtDNA analysis was not able to distinguish between subspecies in Clade C; more genetic work needs to be done to determine how closely-related these subspecies are. Verts and Carraway (2000, p. 1) recognize *T. m. glacialis, pugetensis, tumuli,* and *yelmensis* (the Roy Prairie, Olympia, Tenino, and Yelm pocket gophers, respectively) as separate subspecies based on morphological characteristics, distribution, and differences in number of chromosomes. For the purposes of this proposed rule, due to the close proximity of the four subspecies located in Thurston and Pierce counties and the fact that at least three of them occur in the same clade, we will be discussing these four subspecies (*T. m. glacialis, pugetensis, tumuli,* and *yelmensis*) together and will refer to them as ''the four Thurston/Pierce subspecies.''

As noted above, based on these genetic analyses the Olympic pocket gopher (*Thomomys mazama melanops*) may warrant consideration as a separate species (Welch and Kenagy 2006, pp. 5–6). It is sufficiently genetically distinct and geographically isolated from all other subspecies, has very low genetic diversity within the subspecies (i.e., it is relatively inbred) compared to other extant subspecies, and does not share haplotypes with any other *T. mazama* subspecies (Welch and Kenagy 2008, pp. 6–7). In addition, the clade containing this subspecies (Clade A) is highly divergent from the other two clades (Welch and Kenagy 2008, p. 6). This is consistent with genetic isolation through the last glaciation period, suggesting that the subspecies is a relictual population that survived in the nunatak (ice-free areas that serve as glacial refugia in mountain ranges). Verts and Carraway (2000, p. 1) recognize *T. m. melanops* as a separate subspecies based on morphological characteristics and distribution.

The Shelton pocket gopher *(Thomomys mazama couchi)* persists at Scott's Prairie (which is where the Shelton airport is sited) and may also occur in two other nearby areas (Stinson 2005, p. 40). *Thomomys mazama couchi* is not only in a separate clade (Clade B) from the one containing the Thurston/Pierce subspecies (Clade C), but landscape-level connectivity that would allow for gene flow between clades B and C is lacking. Verts and Carraway (2000, p. 1) recognize *T. m. couchi* as a separate subspecies based on morphological characteristics and distribution.

The Cathlamet pocket gopher *(Thomomys mazama louiei)* occurs on commercial timber forest lands in Wahkiakum County. Despite brief survey efforts in the 1970s, 1980s, 1990s, and 2010s, gophers have not been found at the type locality (where it was originally found) since 1956. However, these surveys did not cover the full extent of the soil types (series) known to be used by the Cathlamet pocket gopher (Murnen soil type). For this reason, and because survey efforts were not exhaustive and land use hasn't changed in this area since the type locality for the subspecies was found in 1949 (Gardner 1950), we assume the species may still be extant. No genetic work has been conducted on this subspecies. This subpopulation is about 64 miles (mi) (103 kilometers (km)) away from the next-nearest extant subspecies locality (in Thurston County), with no opportunity for gene flow between them. Verts and Carraway (2000, p. 1) recognize *T. m. louiei* as a separate subspecies based on morphological characteristics and distribution.

Proposed Removal of *Thomomys mazama tacomensis* from the Candidate List

The first identified specimen of *Thomomys mazama tacomensis* was collected in 1853 by Suckley and Cooper (1860) at Fort Steilacoom, but was first described by Taylor (1919, pp. 169–171). Verts and Carraway (2000, p. 1) recognize *T. m. tacomensis* as a separate subspecies based on morphological characteristics and distribution. Its range spanned from Point Defiance in Tacoma, south to Steilacoom, and perhaps as far east as Puyallup. In 1920, Tacoma pocket gophers were collected in Parkland and there are subsequent reports of gophers being caught in Puyallup (Scheffer, unpubl. notes, 1957). Original collection sites were long ago converted to residential and suburban development, and one site is now a gravel mining operation. By 1970, Johnson (Johnson 1982, *in litt.*) believed Tacoma pocket gophers were locally extirpated. Surveys conducted in the early 1990s by Steinberg (1996a), again in 1998 (Stinson 2005, p. 120), and during an extensive survey of historical and potential habitat in the subspecies' known range in 2011 (Tirhi 2012a, *in litt.*) failed to relocate gophers at any of the previously documented locations. Surveys were conducted during the time of year when gopher activity should have been seen if gophers were present.

The soils series in the area of the historical local populations are Alderwood, Bellingham, Everett, Nisqually, and Spanaway. The entire historical area has been heavily developed since the type locality for this subspecies was found in 1918 (Taylor 1919, p. 169). Based on repeated

surveys of previously populated areas where gophers have not been redetected (Steinberg 1995; Tirhi 2012a, *in litt.*), the lack of documented evidence of *T. m. tacomensis* over the last three decades, and the lack of appropriate habitat left at historical locations, we conclude the Tacoma pocket gopher is extinct. Therefore, we propose to remove *T. m. tacomensis* from the candidate list, and this subspecies will not be considered further in this finding.

Proposed Removal of *Thomomys mazama douglasii* from the Candidate List

In our 2007 CNOR (72 FR 69034; December 6, 2007), we added the Brush Prairie pocket gopher (*Thomomys mazama douglasii)* to the list of candidate species due to current (at the time) genetic data and morphological features and based on the presumption that this subspecies was a member of *T. mazama* and not *T. talpoides.* At the time, a review by the State of Washington recognized the Brush Prairie pocket gopher as a subspecies of *T. mazama* instead of *T. talpoides,* and the Service simply accepted that classification without additional evaluation. However, we have now further investigated the genetic and morphological information originally used to add the subspecies to the candidate list based on the presumption that it was a Mazama pocket gopher (Kenagy 2012, pers. comm.; Paulson 2012, pers. comm.; Welch 2012a,b, *in litt.*). While it is not possible to conclusively determine that Brush Prairie pocket gophers are not *T. mazama,* clear evidence to support the conclusion that they are *T. mazama* does not exist at this time. Verts and Carraway (2000, p. 1) do not recognize the Brush Prairie pocket gopher as a member of *T. mazama.* Therefore, based upon review of the best science available, we no longer believe the Brush Prairie pocket gopher is a member of the species *T. mazama.*

The Service erred by failing to conduct a separate five-factor threats analysis when we added the Brush Prairie pocket gopher to the candidate list as *Thomomys mazama douglasii,* and we now believe it was added in error and without basis (i.e., the population is not subject to threats such that listing is warranted under the Act). The Brush Prairie pocket gopher was added to the candidate list based purely on the presumption that it was a Washington subspecies of Mazama pocket gopher, and because all other Washington subspecies of Mazama pocket gophers were candidates. Because the best available science suggests that the Brush Prairie pocket gopher is not a subspecies of *T. mazama,* and because it was added to the candidate list without basis, we propose to remove *T. m. douglasii* from the candidate list, and this subspecies will not be considered further in this analysis.

Habitat and Life History

The Mazama pocket gopher is associated with glacial outwash prairies in western Washington, an ecosystem of conservation concern (Hartway and Steinberg 1997, p. 1), as well as alpine and subalpine meadows and other meadow-like openings at lower elevations (from this point on in the document, we will be evaluating seven Washington subspecies of Mazama pocket gopher: Olympia, Roy Prairie, Tenino, and Yelm (the four Thurston/Pierce subspecies); Shelton; Cathlamet; and Olympic). Steinberg and Heller (1997, p. 46) found that Mazama pocket gophers are even more patchily distributed than are prairies, as there are some seemingly high quality prairies within the species' range that lack pocket gophers (e.g., Mima Mounds NAP, and 13th Division Prairie on Joint Base Lewis-McChord (JBLM)). Pocket gopher distribution is affected by the rock content of soils (gophers avoid rocky soils), drainage, forage availability, and climate (Case and Jasch 1994, p. B–21; Steinberg and Heller 1997, p. 45; Hafner *et al.* 1998, p. 279; Stinson 2005, p. 31; Reichman 2007, pp. 273–274, WDFW 2009), thus further restricting the total area of a prairie that may be occupied by gophers. Prairie and meadow habitats used by pocket gophers have a naturally patchy distribution. In their prairie habitats, there is an even patchier distribution of soil rockiness which may further restrict the total area that pocket gophers can utilize (Steinberg and Heller 1997, p. 45; WDFW 2009). We assume that meadow soils have a similarly patchy distribution of rockiness, though the soil surveys to support this are, at this time, incomplete.

In Washington, Mazama pocket gophers currently occupy the following soils series: Alderwood, Cagey, Carstairs, Everett, Godfrey, Grove, Indianola, Kapowsin, McKenna, Murnen, Nisqually, Norma, Shelton, Spana, Spanaway, Spanaway-Nisqually complex, and Yelm. There is no currently-available soils survey for the Olympia National Park, so soils occupied by gophers there are unknown. Although some soils are sandier, more gravelly, or siltier, most all are friable (easily pulverized or crumbled), loamy, and deep, and generally have slopes less than 15 percent. Mapped soils series can have smaller inclusions of different soils types. Because soils are mapped at larger scales, mapped soils may not reflect these smaller inclusions, which may be used by gophers.

In 2011, there were reports of Mazama pocket gophers (subspecies unknown) occurring on new types of soils and on managed forest lands in Capitol State Forest (owned by WDNR) and Vail Forest (owned by Weyerhaeuser) in Thurston County. These were subsequently determined to be moles, based on trapping conducted in these areas by WDFW during the 2012 gopher survey season (Thompson 2012d, pers. comm.).

Mazama pocket gophers are morphologically similar to other species of pocket gophers that exploit a subterranean existence. They are stocky and tubular in shape, with short necks, powerful limbs, long claws, and tiny ears and eyes. Their short, nearly hairless tails are highly sensitive and probably assist in navigation in tunnels. Burrows consist of a series of main runways, off which lateral tunnels lead to the surface of the ground (Wight 1918, p. 7). Pocket gophers dig their burrows using their sharp teeth and claws and then push the soil out through the lateral tunnels (Wight 1918, p. 8; Case and Jasch 1994, p. B–20). Nests containing dried vegetation are generally located near the center of each pocket gopher's home tunnel system (Wight 1918, p. 10). Food caches and store piles are usually placed near the nest, and excrement is piled into blind tunnels or loop tunnels, and then covered with dirt, leaving the nest and main runways clean (Wight 1918, p. 11). The ''pockets'' of pocket gophers are external, fur-lined cheek pouches on either side of the mouth that are used to transport nesting material and carry plant cuttings to storage compartments. Their teeth grow continuously, requiring gophers to constantly gnaw in order to grind them down (Case and Jasch 1994, p. B–20). Pocket gophers don't hibernate in winter; they remain active throughout the year (Case and Jasch 1994, p. B–20).

A variety of natural predators eat pocket gophers, including weasels, snakes, badgers, foxes, skunks, bobcats, coyotes, great horned owls, barn owls, and several hawks (Hisaw and Gloyd 1926, entire; Fichter *et al.* 1955, p. 13; Huntly and Inouye 1988, p. 792; Case and Jasch 1994, p. B–21; Stinson 2005, pp. 29–30). Many different vertebrates and invertebrates take refuge in gopher burrows, especially during inclement

weather, including beetles, amphibians (such as toads and frogs), lizards, snakes, ground squirrels, and smaller rodents (Blume and Aga 1979, p. 131; Case and Jasch 1994, p. B–21; Stinson 2005, pp. 29–30).

Pocket gophers are generalist herbivores and their diet includes a wide variety of plant material, including leafy vegetation, succulent roots, shoots, and tubers. In natural settings pocket gophers play a key ecological role by aerating soils, activating the seed bank, and stimulating plant growth, though they can be considered pests in agricultural systems. In prairie and meadow ecosystems, pocket gopher activity is important in maintaining species richness and diversity.

The home range of a Mazama pocket gopher is composed of suitable breeding and foraging habitat. Home range size varies based on factors such as soil type, climate, and density and type of vegetative cover (Cox and Hunt 1992, p. 133; Case and Jasch 1994, p. B–21; Hafner *et al.* 1998, p. 279). Home range size for individual Mazama pocket gophers averages about 1,076 square feet (ft^2) (100 square meters (m^2)) (Witmer *et al.* 1996, p. 96). Based on work done by Converse *et al.* (2010, pp. 14–15), a local population of Mazama pocket gophers in the south Puget Sound area could be self-sustaining if it occurred on a habitat patch that was equal to or greater than 50 ac (20 ha) in size.

Foraging primarily takes place below the surface of the soil, where pocket gophers snip off roots of plants before occasionally pulling the whole plant below ground to eat or store in caches. If above-ground foraging occurs, it's usually within a few feet of an opening and forage plants are quickly cut into small pieces, and carried in their fur-lined cheek pouches back to the nest or cache (Wight 1918, p. 12). Any water they need is obtained from their food (Wight 1918, p. 13; Gettinger 1984, pp. 749–750). The probability of Mazama pocket gopher occupancy is much higher in areas with less than 10 percent woody vegetation cover (Olson 2011a, p. 16), because such vegetation will shade out the forbs, bulbs, and grasses that gophers prefer to eat, and high densities of woody plants make travel both below and above the ground difficult for gophers.

Pocket gophers reach sexual maturity during the spring of the year following their birth, and produce one litter per year (Case and Jasch 1994, p. B–20). Gestation lasts approximately 18 days (Schramm 1961, p. 169; Anderson 1978, p. 421). Young are born in the spring to early summer (Wight 1918, p. 13), and are reared by the female. Aside from the breeding season, males and females remain segregated in their own tunnel systems. There are 1–9 pups per litter (averaging 3–4), born without hair, pockets, or teeth, and they must be kept warm by the mother or ''packed'' in dried vegetation (Wight 1918, p. 14; Case and Jasch 1994, p. B–20). Juvenile pelage starts growing in at just over a week (Anderson 1978, p. 420). The young eat vegetation in the nest within 3 weeks of birth, with eyes and ears opening and pockets developing at about a month (Wight 1918, p. 14; Anderson 1978, p. 420). At 6 weeks they are weaned, fighting with siblings, and nearly ready to disperse (Wight 1918, p. 15; Anderson 1978, p. 420), which usually occurs at about 2 months of age (Stinson 2005, p. 26). They attain their adult weight around 4–5 months of age (Anderson 1978, pp. 419, 421). Most pocket gophers live only a year or two, with few living to 3 or 4 years of age (Hansen 1962, pp. 152–153; Livezey and Verts 1979, p. 39).

Pocket gophers rarely surface completely from their burrow except as juveniles, when they disperse above ground from spring through early fall (Ingles 1952, p. 89; Howard and Childs 1959, p. 312; Olson 2011b, unnumbered pp. 3–4). They are highly asocial and intolerant of other gophers. Each gopher maintains its own burrow system, and occupancy of a burrow system by multiple individuals occurs only for brief periods during mating seasons and prior to weaning young (Ingles 1952, pp. 88–89; Witmer and Engeman 2007, p. 288; Marsh and Steele 1992, p. 209). The mating system is probably polygynous (a single male mates with multiple females) and most likely based on female choice. The adult sex ratio has been reported as biased toward females in most species of pocket gophers that have been studied, often as much as 4:1 (Howard and Childs 1959, p. 296; Patton and Feder 1981, p. 917), though Witmer *et al.* (1996, p. 95) reported a sex ratio of close to 1:1 in Mazama pocket gophers.

Sex ratio may vary with population density, which is often a measure of forage density and soil suitability for burrowing. One site having a deep soil layer that was much less rocky was estimated to have a pocket gopher population density five times that of another site having rocky soil (Steinberg 1996, p. 26). A study of the relationship between soil rockiness and pocket gopher distribution revealed a strong negative correlation between the proportion of medium-sized rocks in the soil and absence of pocket gophers in eight of nine prairies sampled (medium sized rocks were considered greater than 0.5 inch (12.7 mm) but less than 2 inches (50.8 mm) in diameter; Steinberg 1996, p. 32). In observations of pocket gopher distribution on JBLM, pocket gophers did not occur in areas with a high percentage of Scot's broom cover in the vegetation, or where mole (*Scapanus* spp.) populations were particularly dense (Steinberg 1995, p. 26). A more recent study on JBLM also found that pocket gopher presence was negatively associated with Scot's broom; however, the researcher found no relationship between pocket gopher presence and mole density (Olson 2011a, pp. 12–13).

Pocket gophers have limited dispersal capabilities. The loss and degradation of additional patches of appropriate habitat could result in further isolation of populations, increasing their vulnerability to extinction. Physiographic, demographic, historical, and stochastic factors probably influence potential dispersal distance (Hafner *et al.* 1998, p. 279). Studies of other larger *Thomomys* gophers found that most will only disperse less than 131 ft (40 m) from their natal territory (Daly and Patton 1990, p. 1291), although some have been found to move greater than 984 ft (300 m) (Williams and Baker 1976, p. 306; Daly and Patton 1990, p. 1286), and up to 1,312 ft (400 m) (Hafner *et al.* 1998, p. 279). In 2010 and 2011, WDFW conducted a study to determine dispersal distances of juvenile Mazama pocket gophers on JBLM. Twenty-eight juveniles were radio-collared and tracked for 17–56 days, with all but 3 animals tracked for more than 30 days. Of these, only 9 gophers moved more than 32.8 ft (10 m), and 10 gophers were never found more than 13.1 ft (4 m) from any previous location (Olson 2012b, p. 5). Only 1 animal dispersed what would be considered a larger distance, moving 525 ft (160 m) in a single day. This research is ongoing.

Historical and Current Range and Distribution

The Olympic pocket gopher (*Thomomys mazama melanops)* is found in the Olympic National Park in Clallam County where it is restricted to subalpine habitat of the higher Olympic Mountains. While the protections of the National Park Service (NPS) suggest that this is the most secure of the subspecies in Washington, three local populations had been extirpated by 1951, and another was recorded as extirpated by 1976 (Johnson 1977, pp. 2–3). By 1977, Johnson (1977, p. 1) estimated that the subspecies had been extirpated from about 30 percent of its range, and speculated that such extirpations may

have been related to fire suppression, avalanches, landslides, or weather cycles. Steinberg (1995, p. 27; 1996, p. 8) and Welch (2009, *in litt.*) documented Olympic pocket gophers at several sites in the Park, and the Burke Museum's records show that pocket gopher specimens have been gathered from multiple locations in the Park (Burke Museum 2009). A series of surveys were conducted in the summer of 2012, and found evidence of Mazama pocket gophers still occurring in the same areas as found by Johnson and Steinberg (Fleckenstein 2012, *in litt.*). Further surveys need to be conducted to determine the status of this subspecies, as no complete inventory has been conducted. There have been no soil surveys conducted on the Olympic National Park, so soils series names are not known at the locations where gophers occur in Clallam County.

The Shelton pocket gopher *(Thomomys mazama couchi)* was known from one local population detected at the Shelton airport in Mason County and mounds found near the penitentiary grounds near Shelton (Stinson 2005, p. 39). A nearby regenerating clearcut was found to have been colonized by pocket gophers after 1992 (Stinson 2005, p. 41). Other local populations have been identified nearby on private land, including a recent clearcut near the airport (Stinson 2011a, *in litt.*). New populations have been found on commercial timber lands and private lands in Mason County (Olson 2011b, *in litt.*) and more may exist (Krippner 2011b, entire). Pocket gopher sign has been reported elsewhere, but their presence has not been verified by trapping (Stinson 2011b, pers. comm.). All currently known gopher sites in Mason County occur on Carstairs, Grove, or Shelton soils.

The Cathlamet pocket gopher (*Thomomys mazama louiei*) is known only from its type locality in Wahkiakum County. The Cathlamet pocket gopher was originally found on commercial forest lands in a large burn that subsequently regenerated to forest. The forest was clearcut in the early 2000s, but pocket gophers have not been found at this site since 1956, despite brief survey efforts in the 1970s, 1980s, 1990s, and 2010s (Stinson 2005, p. 34; Thompson 2012a, p. 1 *in litt.*). The soils series these gophers occupy (Murnen) is locally limited in extent, and patchily distributed. In the Service's review of this species previously (USFWS 2010, pp. 5–6), it was characterized as likely extinct. However, based on our further review of information for this proposed rule, we determined that further surveys of the area are needed to determine the status of this subpopulation, as thorough surveys of all potential habitat have never been conducted and land use has remained the same since the type locality was discovered in 1949 (Gardner 1950), suggesting that the subspecies may remain extant.

The following general description of the distribution of the four Thurston/Pierce subspecies of Mazama pocket gopher (*Thomomys mazama glacialis, pugetensis, tumuli,* and *yelmensis*) is based on our current knowledge. Steinberg (1996, p. 9) surveyed all historical and many currently known gopher sites. This included all current and formerly known occupied sites listed by the WDNR as having Carstairs, Nisqually, or Spanaway gravelly or sandy loam soil, and that WDNR determined to have vegetation that was intact prairie or restorable to prairie. WDFW and a suite of consultants have surveyed areas of potential gopher habitat in both counties, usually associated with proposed development (Krippner 2011a, pp. 26–29). WDFW has also surveyed areas in relation to various research studies, as well as conducting a 5-county-wide distribution survey in 2012 (Thompson 2012b and c, entire).

The Roy Prairie pocket gopher (*Thomomys mazama glacialis*) is found in the vicinity of the Roy Prairie and on JBLM in Pierce County. The subspecies was described as plentiful in 1983 but was reduced to a small population by 1993 (Stinson 2005, p. 38). Due to proximity to the subspecies' type locality, it is likely that gophers occurring on 91st Division Prairie and Marion Prairie in Pierce County contain this subspecies. Soils in and around this area are Everett, Indianola, Norma, Spanaway, and Nisqually.

The type locality for the Olympia pocket gopher (*Thomomys mazama pugetensis*) was the prairie on and around the Olympia Airport (Dalquest and Scheffer 1944b, p. 445). Gophers continue to occupy this area. Soils in and around this area are Alderwood, Cagey, Everett, Indianola, McKenna, Nisqually, Norma, Spana, Spanaway-Nisqually complex, and Yelm.

Tenino pocket gophers (*Thomomys mazama tumuli*) were originally found in the vicinity of the Rocky Prairie NAP, near Tenino (Stinson 2005, pp. 19, 33, 38), a relatively small-extent prairie area. Gophers still reside there, but WDFW researchers have not seen consistent occupancy of the area by gophers in recent years (Olson 2010, *in litt.*), suggesting that the colonies intermittently located in the NAP are satellite populations dispersing from a currently unidentified nearby source population. Soils in this area are Everett, Nisqually, Norma, Spanaway, and Spanaway-Nisqually complex.

Yelm pocket gophers (*Thomomys mazama yelmensis*) were originally found on prairies in the area of Grand Mound, Vail, and Rochester (Dalquest and Scheffer 1944b, p. 446). Surveys conducted in 1993–1994 found no gophers near the towns of Vail or Rochester (Steinberg 1995, p. 28); however, more recent surveys have documented gophers near Rochester, Rainier, Littlerock, Grand Mound, and Vail (Krippner 2011a, p. 31). Soils series in and around these areas include Alderwood, Everett, Godfrey, Kapowsin, McKenna, Nisqually, Norma, Spana, Spanaway, Spanaway-Nisqually complex, and Yelm.

Population Estimates/Status

There are few data on historical or current population sizes of Mazama pocket gopher populations in Washington, although several local populations and one subspecies are believed to be extinct. Knowledge of the past status of the Mazama pocket gopher is limited to distributional information. Recent surveys have focused on determining current distribution, primarily in response to development applications. In addition, in 2012, WDFW initiated a 5-county-wide distribution survey. Because the object of all of these surveys has mainly been presence/absence only, total population numbers for each subspecies are unknown. Local population estimates have been reported but are based on using apparent gopher mounds to delineate the number of territories, a method that has not been validated (Stinson 2005, pp. 40–41). Olson (2011a, p. 2) evaluated this methodology on pocket gopher populations at the Olympia Airport and Wolf Haven International. Although there was a positive relationship between the number of mounds and number of pocket gophers, the relationship varies spatially, temporally, and demographically (Olson 2011a, pp. 2, 39). Based on the results of Olson's 2011 study we believe past population estimates (Stinson 2005) may have been too high. As there is no generally-accepted standard survey protocol for pocket gophers, it is difficult to make a reliable determination of population abundance or trend.

Increased survey effort since 2007 has resulted in the identification of numerous additional occupied sites located on private lands, especially in Thurston County (Krippner 2011, pp. 26–29). Some of these are satellite colonies adjacent to known larger

populations, such as that on the Olympia Airport, and may be population sinks (colonies that do not add to the overall population through recruitment). Others are separate locations, seemingly unassociated (physically) with known populations (Tirhi 2008, *in litt.*). The largest known local populations of any Mazama pocket gophers in Washington occur on JBLM (Roy Prairie and Yelm pocket gophers), and at the Olympia and Shelton airports (Olympia and Shelton pocket gophers, respectively).

A translocated population of Mazama pocket gophers occurs on Wolf Haven International's land near Tenino, Washington. Between 2005 and 2008, over 200 gophers from a variety of areas in Thurston County (mostly from around Olympia Airport (Olympia pocket gopher, *Thomomys mazama pugetensis*)) were released into the 38-ac (15-ha) mounded prairie site. Based on the best available information, we do not believe the property contained Mazama pocket gophers previously. Today pocket gophers continue to occupy the site (Tirhi 2011, *in litt.*); however current population estimates are not available. Another site, West Rocky Prairie Wildlife Area, has received a total number of 560 translocated pocket gophers (*T. m. pugetensis*) from the Olympia Airport between 2009 and 2011. Initial translocation efforts in 2009 were unsuccessful; a majority of the pocket gophers died within 3 days due to predation (Olson 2009, unnumbered p. 3). Modified release techniques used in 2010 and 2011 resulted in improved survival rates of gophers translocated to West Rocky Prairie Wildlife Area (Olson 2011c, unnumbered p. 4). It is too soon to know if the population will become self-sustaining, or if additional translocations of gophers will be necessary. This research is ongoing.

Summary of Factors Affecting the Species

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations at 50 CFR part 424, set forth the procedures for adding species to the Federal List of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, we may list a species based on any of the following five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence. Listing actions may be warranted based on any of the above threat factors, singly or in combination. Each of these factors is discussed below.

In making this finding, information pertaining to each of the species in question in relation to the five factors provided in section 4(a)(1) of the Act is discussed below. In considering what factors might constitute threats, we must look beyond the mere exposure of the species to the factor to determine whether the species responds to the factor in a way that causes actual impacts to the species. If there is exposure to a factor, but no response, or only a positive response, that factor is not a threat. If there is exposure and the species responds negatively, the factor may be a threat and we then attempt to determine how significant a threat it is. If the threat is significant, it may drive or contribute to the risk of extinction of the species such that the species warrants listing as an endangered or threatened species as those terms are defined by the Act. This does not necessarily require empirical proof of a threat. The combination of exposure and some corroborating evidence of how the species is likely impacted could suffice. The mere identification of factors that could impact a species negatively is not sufficient to compel a finding that listing is appropriate; we require evidence that these factors are operative threats that act on the species to the point that the species meets the definition of an endangered or threatened species under the Act.

In making the 12-month finding for each of the subspecies addressed in this document we considered and evaluated the best available scientific and commercial information. Here we evaluate the factors affecting the subspecies under consideration in this proposed rule.

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

Under this factor, the primary long term threats to the Mazama pocket gopher are the loss, conversion, and degradation of habitat particularly to urban development, successional changes to grassland habitat, and the spread of invasive plants. The threats also include increased predation pressure, which is closely linked to habitat degradation and discussed more fully under Factor C.

The prairies of south Puget Sound are part of one of the rarest ecosystems in the United States (Noss *et al.* 1995, p. I–2; Dunn and Ewing 1997, p. v). Dramatic changes have occurred on the landscape over the last 150 years, including a 90 to 95 percent reduction in the prairie ecosystem. In the south Puget Sound region, where most of western Washington's prairies historically occurred, less than 10 percent of the original prairie persists, and only 3 percent remains dominated by native vegetation (Crawford and Hall 1997, pp. 13–14).

Development

Native prairies and grasslands have been severely reduced throughout the range of the four Thurston/Pierce subspecies of Mazama pocket gopher and the Shelton pocket gopher as a result of human activity due to conversion of habitat to residential and commercial development and agriculture. Prairie habitat continues to be lost, particularly to residential development (Stinson 2005, p. 70) by removal and fragmentation of native vegetation and the excavation and grading of surfaces and conversion to non-habitat (buildings, pavement, other infrastructure) rendering soils unsuitable for burrowing. Residential development is associated with increased infrastructure such as new road construction, which is one of the primary causes of landscape fragmentation (Watts *et al.* 2007, p. 736). Activities that accompany low-density development are correlated with decreased levels of biodiversity, mortality to wildlife, and facilitated introduction of nonnative invasive species (Trombulak and Frissell 2000, entire; Watts *et al.* 2007, p. 736). In the south Puget Sound lowlands, the glacial outwash soils and gravels underlying the prairies are deep and valuable for use in construction and road building, which leads to their degradation and destruction.

In the south Puget Sound, Mazama pocket gophers most commonly reside in Nisqually loamy soils (Stinson 2010a, *in litt.*), the vast majority of which occur in developed areas of Thurston County, or within the Urban Growth Areas for the cities of Olympia, Tumwater, and Lacey (Thurston County 2004; WDFW 2009a), where future development is most likely to occur. Where pocket gopher populations presumably extended across an undeveloped expanse of open prairie (Dalquest and Scheffer 1942, pp. 95–96), current local populations of gophers in these areas are now isolated to small fragmented patches.

The presumed extinction of the Tacoma pocket gopher is likely linked directly to residential and commercial development, which has replaced nearly all gopher habitat in the historical range of the subspecies (Stinson 2005, pp. 18,

34, 46). One of the historical Tacoma pocket gopher sites was converted to a large gravel pit and golf course (Stinson 2005, pp. 47, 120; Steinberg 1996, pp. 24, 27). In addition, two gravel pits are now operating on part of the site recognized as the type locality for the Roy Prairie pocket gopher (Stinson 2005, p. 42), and another is in operation near Tenino (Stinson 2010b, *in litt.*) in the vicinity of the type locality for the Tenino pocket gopher. Many areas historically occupied by Mazama pocket gophers in Olympia and Lacey have been lost to development (Stinson 2005, p. 26).

Multiple pocket gopher sites in Pierce and Thurston Counties may be, or have been lost to, gravel pit development, golf course development, or residential and commercial development (Stinson 2005, pp. 26, 42; Stinson 2007, *in litt.,* and 2010b, *in litt.*). Multiple prairies that used to contain local populations of pocket gophers within the range of the four Thurston/Pierce subspecies have been developed to cities, neighborhoods, or agricultural lands, including Yelm Prairie, Grand Mound Prairie, Baker Prairie, Chambers Prairie, and Roy Prairie.

Where their properties coincide with gopher occupancy, many private lands developers and landowners in Thurston County have agreed to create gopher set-asides in order to obtain development permits from the County (Tirhi 2008, *in litt.*). However, it is unknown if any gophers will remain on these sites due to the small size of the set-asides, extensive grading in some areas, lack of enforcement or monitoring of set-aside maintenance (Defobbis 2011, *in litt.*), and lack of control of predation by domestic or feral cats or dogs.

There are two local populations of Olympia and Shelton pocket gophers located at and around airports (Port of Olympia's Olympia Airport and Port of Shelton's Sanderson Field). Gophers at the Olympia Airport are currently threatened by development from the airport itself and adjacent landowner development. The Port of Olympia is realigning the airport runway, and has plans to develop large portions of the existing grassland that likely supports the largest population of the Olympia pocket gopher in Washington (Stinson 2007, *in litt.;* Port of Olympia and WDFW 2008, p.1; Port of Olympia 2012). They continue to work with WDFW on mitigating airport expansion activities that may impact gophers (Tirhi 2010, *in litt.*).

Shelton Pocket Gopher. While past construction of the Port of Shelton's Sanderson Field previously removed prairie habitat in an area occupied by Shelton pocket gophers, future development plans do not include impacts to a significant amount of gopher habitat at this time. The majority of planned development will occur in areas already impacted (between existing buildings). Potential additions of pavement for hangars and a runway extension are planned in gopher use areas at the south end of the airport. However, neither project would impact a significant portion of the entire area used by gophers (Port of Shelton 2010, 2012). In addition, the Port will have to prove to the Federal Aviation Administration that a need exists to extend the existing runway, which is unlikely to occur in the next 5 years (Palmer 2012, *in litt.*). The Port of Shelton operates under a Gopher Habitat Management Plan (Port of Shelton 2003) and has identified a smaller restoration area of approximately 50 ac (20 ha) across Highway 101 from the airport, where Scot's broom and other woody vegetation would be controlled in order to benefit Mazama pocket gophers, although the soil type in the restoration site (Shelton) is different from that on most of Sanderson Field (Carstairs). The majority of other local populations of Shelton pocket gophers in Mason County (i.e., those that occur off of Port property) do not appear to face a threat of development, as they largely occur on commercial timber forest lands.

Olympic, Roy, and Yelm Pocket Gophers. The Olympic pocket gopher, occurring entirely within the Olympic National Park, the Yelm pocket gophers at Tenalquot Preserve and Scatter Creek Wildlife Area, and the translocated populations at West Rocky Prairie Wildlife Area (all Olympia pocket gophers from the Olympia Airport) and Wolf Haven (largely from around the Olympia Airport, but could include other subspecies), are currently secure from intense commercial and residential development pressures as these populations occur on conserved lands. JBLM local populations (which could include both Roy Prairie and Yelm pocket gophers due to Department of Defense (DOD) land holdings that overlap the ranges of both subspecies) are also secure from such residential and commercial development; however, impacts due to military training threaten gopher habitat and may lead to reduced use of these areas by gophers (see Military Activities, below).

Cathlamet Pocket Gopher. We have no information available that indicates that development is a threat to the Cathlamet subspecies of Mazama pocket gopher.

Loss of Ecological Disturbance Processes, Invasive Species, and Succession

The suppression and loss of ecological disturbance regimes across vast portions of the landscape, such as fire, has resulted in altered vegetation structure in the prairies and meadows and has facilitated invasion by native and nonnative woody vegetation, rendering habitat unusable for the four Thurston/Pierce and Shelton subspecies of Mazama pocket gopher. The basic ecological processes that maintain prairies and meadows have disappeared from, or have been altered on, all but a few protected and managed sites.

Historically, the prairies and meadows of the south Puget Sound region of Washington are thought to have been actively maintained by the native peoples of the region, who lived here for at least 10,000 years before the arrival of Euro-American settlers (Boyd 1986, entire; Christy and Alverson 2011, p. 93). Frequent burning reduced the encroachment and spread of shrubs and trees (Boyd 1986, entire; Chappell and Kagan 2001, p. 42), favoring open grasslands with a rich variety of native plants and animals. Following Euro-American settlement of the region in the mid-19th century, fire was actively suppressed on grasslands, allowing encroachment by woody vegetation into the remaining prairie habitat and oak woodlands (Franklin and Dyrness 1973 p. 122; Boyd 1986, entire; Kruckeberg 1991, p. 287; Agee 1993, p. 360; Altman *et al.* 2001, p. 262).

Fires on the prairie create a mosaic of vegetation conditions, which serve to maintain native prairie plant communities. In some prairie patches fires will kill encroaching woody vegetation and reset succession back to bare ground, creating early successional vegetation conditions suitable for many native prairie species. Early succession forbs and grasses are favored by Mazama pocket gophers. The historical fire frequency on prairies has been estimated to be 3 to 5 years (Foster 2005, p. 8).

The result of fire suppression has been the invasion of the prairies and oak woodlands by native and nonnative plant species (Dunn and Ewing 1997, p. v; Tveten and Fonda 1999, p. 146), notably woody plants such as the native Douglas-fir and the nonnative Scot's broom. On tallgrass prairies in midwestern North America, fire suppression has led to degradation and the loss of native grasslands (Curtis 1959, pp. 296, 298; Panzer 2002, p. 1297). On northwestern prairies, fire suppression has allowed Douglas-fir to

encroach on and outcompete native prairie vegetation for light, water, and nutrients (Stinson 2005, p. 7). This increase in woody vegetation and nonnative plant species has resulted in less available prairie habitat overall and habitat that is unsuitable for and avoided by many native prairie species, including the Mazama pocket gopher (Tveten and Fonda 1999, p. 155; Pearson and Hopey 2005, pp. 2, 27; Olson 2011a, pp. 12, 16). Pocket gophers prefer early successional vegetation as forage. Woody plants shade out the forbs and grasses that gophers prefer to eat, and high densities of woody plants make travel both below and above the ground difficult for gophers. In locations with poor forage, pocket gophers tend to have larger territories, which may be difficult to establish in densely forested areas. The probability of Mazama pocket gopher occupancy is much higher in areas with less than 10 percent woody vegetation cover (Olson 2011a, p. 16).

On JBLM alone, over 16,000 acres (6,477 ha) of prairie has converted to Douglas-fir forest since the mid-19th century (Foster and Shaff 2003, p. 284). Where controlled burns or direct tree removal are not used as a management tool, this encroachment will continue to cause the loss of open grassland habitats for Mazama pocket gophers and is an ongoing threat for the species.

Restoration in some of the south Puget Sound grasslands has resulted in temporary control of Scot's broom and other invasive plants through the careful and judicious use of herbicides, mowing, grazing, and fire. Fire has been used as a management tool to maintain native prairie composition and structure and is generally acknowledged to improve the health and composition of grassland habitat by providing a short-term nitrogen addition, which results in a fertilizer effect to vegetation, thus aiding grasses and forbs as they resprout.

Unintentional fires ignited by military training burn patches of prairie grasses and forbs on JBLM on an annual basis. These light ground fires create a mosaic of conditions within the grassland, maintaining a low vegetative structure of native and nonnative plant composition, and patches of bare soil. Because of the topography of the landscape, fires create a patchy mosaic of areas that burn completely, some areas that do not burn, and areas where consumption of the vegetation is mixed in its effects to the habitat. One of the benefits to fire in grasslands is that it tends to kill regenerating conifers, and reduces the cover of nonnative shrubs such as Scot's broom, although Scot's broom seed stored in the soil can be stimulated by fire (Agee 1993, p. 367). Fire also improves conditions for many native bulb-forming plants, such as *Camassia* sp. (camas) (Agee and Dunwiddie 1984, p. 367). On sites where regular fires occur, such as on JBLM, there is a high complement of native plants and fewer invasive species. These types of fires promote the maintenance of the native short-statured plant communities favored by pocket gophers.

Management practices such as intentional burning and mowing require expertise in timing and technique to achieve desired results. If applied at the wrong season, frequency, or scale, fire and mowing can be detrimental to the restoration of native prairie species. Excessive and high intensity burning can result in a lack of vegetation or encourage regrowth to nonnative grasses. Where such burning has occurred over a period of more than 50 years on the artillery ranges of the JBLM, prairies are covered by nonnative forbs and grasses instead of native perennial bunchgrasses (Tveten and Fonda 1999, pp. 154–155).

Mazama pocket gophers are not commonly found in areas colonized by Douglas-fir trees because gophers require forbs and grasses of an early successional stage for food (Witmer *et al.* 1996, p. 96). Mazama pocket gophers observed on JBLM did not occur in areas with high cover of Scot's broom (Steinberg 1995, p. 26). A more recent study on JBLM also found that pocket gopher presence was negatively associated with Scot's broom (Olson 2011a, pp. 12–13, 16). Some subspecies of Mazama pocket gophers may disperse through forested areas or may temporarily establish territories on forest edges, but there is currently not enough data available to determine how common this behavior may be or which subspecies employ it. The four Thurston/Pierce subspecies occur on prairie-type habitats, many of which, if not actively managed to maintain vegetation in an early-successional state, have been invaded by shrubs and trees that either preclude the gophers or limit their ability to fully occupy the landscape.

Some areas which are occupied by the Olympic, Cathlamet, and to some extent the Shelton subspecies of Mazama pocket gopher, may be at risk due to ingrowth of trees (Vale 1981, p. 61; Magee and Antos 1992, pp. 492–493; Woodward *et al.* 1995, p. 224; Zolbrod and Peterson 1999, pp. 1970–1971). This encroachment appears to be occurring slowly and other factors may prevent it or set it back, including increased or decreased precipitation (depending on season), growing season duration and temperature, timing and duration of snowpack, increased fire frequency, or windthrow. Such factors can be extremely site-specific in nature and microclimatically based. This makes it difficult to predict where, when, and to what extent encroachment may occur (see discussion under Climate Change, Factor E). The loss of natural disturbance processes and succession aren't known to be a current threat to the Olympic or Cathlamet subspecies of Mazama pocket gopher.

Where the Shelton pocket gopher occurs on Sanderson Field (the largest open prairie habitat in the range of the Shelton pocket gopher), airport management prevents woody vegetation from encroaching for flight safety reasons. Vegetative encroachment is therefore not an issue at this site. The Shelton pocket gopher's range overlaps both prairie and commercial timberlands. Due to management actions at Sanderson Field, and due to the subspecies' ability to take advantage of forest openings created by management, succession or loss of habitat does not appear to be an overall threat to this subspecies.

Military Training

Populations of Mazama pocket gophers occurring on JBLM are exposed to differing levels of training activities on the base. The DOD's proposed actions under 'Grow the Army' (GTA) include stationing 5,700 new soldiers, new combat service support units, a combat aviation brigade, facility demolition and construction to support the increased troop levels, and additional aviation, maneuver, and live fire training (75 FR 55313, September 10, 2010). The increased training activities will affect nearly all training areas at JBLM resulting in an increased risk of accidental fires, and habitat destruction and degradation through vehicle travel, dismounted training, bivouac activities, and digging. While training areas on the base have degraded habitat for these species, with implementation of conservation measures, these areas still provide habitat for the Mazama pocket gopher.

Several moderate- to large-sized local populations of Mazama pocket gophers have been identified on JBLM. We believe these are likely to be Roy Prairie and Yelm pocket gophers. Their absence from some sites of what is presumed to have been formerly suitable habitat may be related to compaction of the soil due to years of mechanized vehicle training, which impedes burrowing activities of pocket gophers (Steinberg 1995, p. 36). Training infrastructure (roads, firing

ranges, bunkers) also degrades gopher habitat and may lead to reduced use of these areas by pocket gophers. For example, as part of the GTA effort, JBLM has plans to add a third rifle range on the south impact area where it overlaps with a densely occupied Mazama pocket gopher site. The area may be usable by gophers when the project is completed; however, construction of the rifle range may result in removal of forage and direct mortality of gophers through crushing of burrows (Stinson 2011c, *in litt.*). We assume, as access is not allowed there, that gophers are unable to fully utilize the otherwise apparently suitable central portion of 91st Division Prairie due to repeated and ongoing bombardment of that area. Other JBLM training areas have varying levels of use; some allow excavation (Marion Prairie) and off-road vehicle use, while other areas have restrictions that limit off-road vehicle use. No military training occurs in the range of the Olympic, Cathlamet, Shelton, Olympia, or Tenino subspecies of Mazama pocket gopher.

JBLM has committed to restrictions both seasonally and operationally on military training areas, in order to avoid and minimize potential impacts to Mazama pocket gophers. These restrictions include identified non-training areas, seasonally restricted areas during breeding, and the adjustment of mowing schedules to protect the species. These conservation management practices are outlined in an operational plan that the Service has assisted the DOD in developing for JBLM (Thomas 2012, pers. comm.).

Restoration Activities

Management for invasive species and encroachment of conifers requires control through equipment, herbicides, and other activities. While restoration has conservation value for the species, management activities to implement restoration may also have direct impacts to the species that are the target of habitat restoration.

In the south Puget Sound, Mazama pocket gopher habitat has been degraded and encroached upon by native and nonnative shrubs, including Scot's broom and several Washington State listed noxious weeds, such as *Euphorbia esula* (leafy spurge) and *Centaurea* sp. (knapweed) (Dunn and Ewing 1997, p. v; Vaughan and Black 2002, p. 11). Steinberg (1995, p. 26) observed that pocket gophers on JBLM did not occur in areas with thick Scot's broom and Olson (2011a, pp. 12–13) also found that pocket gopher presence was negatively associated with Scot's broom. Most restoration activities are unlikely to have direct impacts on pocket gophers, though removal of nonnative vegetation is likely to temporarily decrease available forage for Mazama pocket gophers.

Disease Impacts to Habitat

Disease is not known to be a threat to the habitats of the Washington subspecies of Mazama pocket gophers.

Summary of Factor A

Here we summarize the threats to the seven subspecies of Mazama pocket gophers under consideration in this proposed rule.

Much of the habitat originally used by the four Thurston/Pierce subspecies has been fragmented and/or lost to development. Residential and commercial development in the restricted remaining range of the four Thurston/Pierce subspecies is expected to continue into the future, and is likely to continue to result in substantial impacts to the subspecies' habitat and populations. Development removes forage vegetation, renders soils unsuitable for burrowing by covering them with impervious surfaces, or by grading or removing them. Proposed development triggers Critical Area Ordinances (CAOs) in these counties, but resultant set-asides are not always adequate to conserve local populations into the future (for further discussion on these regulatory assurances, see Factor D) The threat of development is not significant for the Shelton pocket gopher. Development is not a threat for the Olympic or Cathlamet pocket gophers.

Past military training has likely negatively impacted two of the four Thurston/Pierce subspecies (Roy Prairie and Yelm pocket gophers) by direct and indirect mortality from bombardment, subsequent fires, and soils compaction on prairies. This threat is expected to continue in the future due to planned increases in stationing and military training at JBLM. Military training is not a threat to the five other subspecies of Mazama pocket gopher.

Degradation of habitat by invasive shrubby species such as Scot's broom continues to be on ongoing significant threat to the four Thurston/Pierce subspecies. Invasive species encroachment into alpine and subalpine meadows is not known to be a threat for the Olympic, Cathlamet, or Shelton pocket gopher.

The four Thurston/Pierce subspecies also face threats from encroachment of native and nonnative plant species into their prairie environments due to succession and fire suppression, and are particularly impacted by the encroachment of woody vegetation. This has resulted in loss of forage vegetation for pocket gophers, as well loss of burrowing habitat, as tree and shrub roots overtake the soils. We have no evidence to indicate that encroachment of woody vegetation is a threat for the Olympic, Shelton, or Cathlamet pocket gophers.

The Washington prairie ecosystem that the Mazama pocket gopher subspecies primarily depend upon has been reduced by an estimated 90 to 95 percent over the past 150 years, with less than 10 percent of the native prairie remaining in the south Puget Sound region today. Due to loss and degradation of gopher habitat from ongoing and future residential and commercial development, encroachment of shrubs and trees into their prairie habitats, and impacts from both current and future military training (for Roy Prairie and Yelm subspecies), we conclude that the threats to the habitat of the four Thurston/Pierce subspecies of Mazama pocket gopher are significant. We did not find any information to suggest that there are habitat based threats for the Olympic, Shelton, or Cathlamet subspecies of Mazama pocket gopher.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Overutilization of species results when the number of individuals removed from the system exceeds the ability of the population of the species to sustain its numbers or reduces populations of the species to a level such that it is vulnerable to other influences (threats) upon its survival. This overutilization can result from removal of individuals from the wild for commercial, recreational, scientific or educational purposes.

One local population of Mazama pocket gopher at Lost Lake Prairie in Mason County (Shelton pocket gopher) may have been extirpated as a result of collecting by Dalquest and Scheffer in the late 1930s or early 1940s (Dalquest and Scheffer 1944, p. 314). Later, Steinberg (1996, p.23) conducted surveys in the vicinity and found no evidence of pocket gophers. In addition, Mazama pocket gophers in Washington were used in a rodenticide experiment as recently as 1995 (Witmer *et al.* 1996, p. 97). Witmer *et al.* (1996, p. 95) claim these were likely *Thomomys mazama tumuli* (Tenino pocket gophers), but these Lacey-area gophers may fall in the range of the Olympia pocket gopher. Hundreds of Olympia pocket gophers died during initial translocation experiments and research conducted by WDFW at Wolf Haven and West Rocky

Prairie, respectively, between 2005 and 2011 (Linders 2008, p. 9; Olson 2011c; Olson 2012a, *in litt.*). In the case of the Wolf Haven translocations, gophers were removed from development sites where pocket gopher mortality would have likely occurred from direct impacts due to site development (crushing of individuals and burrows from heavy machinery excavation, grading, and construction, etc.). Pocket gophers continue to occupy Wolf Haven, despite there being no known occurrence records for the site prior to translocations. Similarly, pocket gophers were not known to inhabit West Rocky Prairie prior to translocation experiments there. Pocket gophers for this research were taken from the Olympia Airport, one of the largest local populations of Mazama pocket gophers in Thurston County. Although no analysis has been completed on the population levels of the Olympia airport population after this experiment, this population remains the largest in Thurston County. The analysis and evaluation of this research is ongoing. Outside of this controlled research, we have no information or evidence that overutilization of any subspecies of Mazama pocket gopher is an ongoing threat now or will become a threat in the future.

Summary of Factor B

In summary, although there is some evidence of historical mortality from overutilization of the Mazama pocket gopher, and there may have been recent mortality from utilization of the Mazama pocket gopher for research purposes, we have no information to indicate that these activities have negatively impacted the species as a whole and have no information to suggest that overutilization will become a threat in the future. In addition, there is no evidence that commercial, recreational, scientific, or educational use is occurring at a level that would pose a threat to the Mazama pocket gopher.

Factor C. Disease or Predation

Disease

Most healthy ecosystems include organisms such as viruses, bacteria, fungi, and parasites that cause disease. Healthy wildlife and ecosystems have evolved defenses to fend off most diseases before they have devastating impacts. An ecosystem with high levels of biodiversity (diversity of species and genetic diversity within species) is more resilient to the impacts of disease because there are greater possibilities that some species and individuals within a species have evolved resistance, or if an entire species is lost, that there will likely be another species to fill the empty niche.

Where ecosystems are not healthy due to a loss of biodiversity and threats such as habitat loss, climate change, pollutants or invasive species, wildlife and ecosystems are more vulnerable to emerging diseases. Diseases caused by or carried by invasive species are particularly severe threats, as native wildlife may have no natural immunity to them (National Wildlife Federation 2012).

Our review of the best available scientific and commercial data found no evidence to indicate that disease is a threat to the Washington Mazama pocket gopher subspecies. We conclude that disease is not a threat to the subspecies now, nor do we anticipate it to become a threat in the future.

Predation

Predation is a process of major importance in influencing the distribution, abundance, and diversity of species in ecological communities. Generally, predation leads to changes in both the population size of the predator and that of the prey. In unfavorable environments, prey species are stressed or living at low population densities such that predation is likely to have negative effects on all prey species, thus lowering species richness. In addition, when a nonnative predator is introduced to the ecosystem, negative effects on the prey population may be higher than those from co-evolved native predators. The effect of predation may be magnified when populations are small, and the disproportionate effect of predation on declining populations has been shown to drive rare species even further towards extinction (Woodworth 1999, pp. 74–75).

Predation has an impact on populations of the four Thurston/Pierce subspecies of Mazama pocket gopher. For the Mazama pocket gopher, urbanization, particularly in the south Puget Sound area, has resulted in not only habitat loss, but the increased exposure to feral and domestic cats (*Felis catus*) and dogs (*Canis lupus familiaris*). Domestic cats are known to have serious impacts on small mammals and birds and have been implicated in the decline of several endangered and threatened mammals, including marsh rabbits in Florida and the salt-marsh harvest mouse in California (Ogan and Jurek 1997, p. 89). Domestic cats and dogs have been specifically identified as common predators of pocket gophers (Wight 1918, p. 21; Henderson 1981, p. 233; Case and Jasch 1994, p. B–21) and at least two Mazama pocket gopher locations were found as a result of house cats bringing home pocket gopher carcasses (WDFW 2001, entire). In addition, the last specimens and last known individuals of the Tacoma pocket gopher were carcasses brought home by cats (Stinson 2005, p. 34). There is also one recorded instance of a WDFW biologist being presented with a dead Mazama pocket gopher by a dog during an east Olympia, Washington, site visit in 2006 (Burke Museum 2012).

The four Thurston/Pierce subspecies of Mazama pocket gopher occur in rapidly developing areas. Local populations that survive commercial and residential development (adjacent to and within habitat) are vulnerable to extirpation by domestic and feral cats and dogs (Henderson 1981, p. 233; Case and Jasch 1994, p. B–21). As stated previously, predation is a natural part of the Mazama pocket gopher's life history; however, the effect of predation may be magnified when populations are small. The disproportionate effect of additional predation on declining populations has been shown to drive rare species even further towards extinction (Woodworth 1999, pp. 74–75). Predation, particularly from nonnative species, will likely continue to be a threat to the four Thurston/Pierce subspecies of Mazama pocket gopher now and in the future, particularly where development abuts gopher habitat. In such areas where local populations are already small, this additional predation pressure (above natural levels of predation) is expected to further impact population numbers. We have no information to indicate that predation is a threat to the Olympic, Shelton, or Cathlamet subspecies of Mazama pocket gopher.

Summary of Factor C

Based on our review of the best available information, we conclude that disease is not a threat to the Mazama pocket gopher now, nor do we expect it to become a threat in the future.

Because the populations of the four Thurston/Pierce subspecies of Mazama pocket gopher are declining and small, we find that the effect of the threat of predation by feral and domestic pets (cats and dogs) is resulting in a significant impact on the subspecies. Therefore, based on our review of the best available scientific and commercial information, we conclude that predation is currently a threat to the four Thurston/Pierce subspecies of Mazama pocket gopher now and will continue to be in the future. We have no information to indicate that predation is a threat to the Olympic, Shelton, or

Cathlamet subspecies of Mazama pocket gopher.

Factor D. The Inadequacy of Existing Regulatory Mechanisms

Under this factor, we examine whether existing regulatory mechanisms are inadequate to address the threats to the subspecies discussed under the other factors. Section 4(b)(1)(A) of the Act requires the Service to take into account ''those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species * * *.'' In relation to Factor D under the Act, we interpret this language to require the Service to consider relevant Federal, State, and Tribal laws, regulations, and other such mechanisms that may minimize any of the threats we describe in threat analyses under the other four factors, or otherwise enhance conservation of the subspecies. We give strongest weight to statutes and their implementing regulations and to management direction that stems from those laws and regulations. An example would be State governmental actions enforced under a State statute or constitution, or Federal action under statute.

The following section includes a discussion of Federal, State, Tribal, or local laws, regulations, or treaties that apply to the Mazama pocket gopher. It includes legislation for Federal land management agencies and State and Federal regulatory authorities affecting land use or other relevant management.

United States Federal Laws and Regulations

There are no Federal laws in the United States that specifically address the Mazama pocket gopher.

The Sikes Act (16 U.S.C. 670) authorizes the Secretary of Defense to develop cooperative plans with the Secretaries of Agriculture and the Interior for natural resources on public lands. The Sikes Act Improvement Act of 1997 requires Department of Defense installations to prepare Integrated Natural Resource Management Plans (INRMPs) that provide for the conservation and rehabilitation of natural resources on military lands consistent with the use of military installations to ensure the readiness of the Armed Forces. INRMPs incorporate, to the maximum extent practicable, ecosystem management principles and provide the landscape necessary to sustain military land uses. While INRMPs are not technically regulatory mechanisms because their implementation is subject to funding availability, they can be an added conservation tool in promoting the recovery of endangered and threatened species on military lands.

On JBLM in Washington, several policies and an INRMP are in place to provide conservation measures to grassland associated species that occupy training lands on the military base. JBLM in partnership with local agencies and nongovernmental organizations has provided funding to conserve these species through the acquisition of new conservation properties and management actions intended to improve the amount and distribution of habitat for these species. JBLM has also provided funding to reintroduce declining species into suitable habitat on and off military lands. In June 2011, representatives from DOD (Washington, DC, office) met with all conservation partners to assess the success of this program and make decisions as to future funding needs. Support from the Garrison Commander of JBLM and all partners resulted in an increase in funding for habitat management and acquisition projects for these species on JBLM.

The Service has worked closely with the DOD to develop protection areas within the primary habitat for Mazama pocket gophers on JBLM. These include areas where no vehicles are permitted on occupied habitat, where vehicles will remain on roads only, and where only foot traffic is allowed.

JBLM policies include Army Regulation 420–5, which covers the INRMP, and AR–200–1. This is an agreement between each troop and DOD management that actions taken by each soldier will comply with restrictions placed on specific Training Areas, or range lands. Within the INRMP, the wildlife branch of the DOD is developing updated Endangered Species Management Plans (ESMPs) that provide site specific management and protection actions that are taken on military lands for the conservation of the Mazama pocket gopher. The ESMPs will provide assurances of available funding, and an implementation schedule that determines when certain activities will occur and who will accomplish these actions. ESMPs require regular updates to account for local or rangewide changes in species status. INRMPs also have a monitoring component that would require modifications, or adaptive management, to planning actions when the result of that specific action may differ from the intent of the planned action. Therefore, although current military actions may continue to harm individuals of the species, we expect (based on our ongoing technical assistance) that the Final ESMPs and revised INRMP will provide greater conservation benefit to the species than this current level of management and will protect Mazama pocket gophers from further population declines associated with habitat loss or inappropriate management on JBLM properties.

The National Park Service Organic Act of 1916, as amended (39 Stat. 535, 16 U.S.C. 1), states that the National Park Service (NPS) ''shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations * * * to conserve the scenery and the national and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.'' The NPS Management Policies indicate that the Park Service will ''meet its obligations under the National Park Service Organic Act and the Endangered Species Act to both pro-actively conserve listed species and prevent detrimental effects on these species.'' This includes working with the Service and undertaking active management programs to inventory, monitor, restore, and maintain listed species' habitats, among other actions.

The Olympic pocket gopher occurs entirely on National Park land and is protected by Federal regulations. Under Federal regulations, disturbance, collection of, or possessing unlawfully taken wildlife, except by authorized hunting and trapping activities is prohibited (36 CFR 2.1(a)(1)(i), 2.2(a)(1)(2)(3), and (b)(1)(2)(3)(4)). The Park also provides some protection to the species due to its threatened status in the State of Washington. According to the regulations codified in 36 CFR 2.5(c);

> ''A permit to take an endangered or threatened species listed pursuant to the Endangered Species Act, or similarly identified by the States, shall not be issued unless the species cannot be obtained outside of the park area and the primary purpose of the collection is to enhance the protection or management of the species.''

Based on our review, we conclude that the Olympic pocket gopher is not faced with further population declines associated with habitat loss or inappropriate management due to the inadequacy of existing NPS regulations.

State Laws and Regulations

Although there is no State Endangered Species Act in Washington, the Washington Fish and Wildlife Commission has authority to list species (Revised Code of Washington (RCW) 77.12.020). The Mazama pocket gopher

is currently listed as a threatened species by the WDFW. State-listed species are protected from direct take and/or malicious' take' but their habitat is not protected (RCW 77.15.120). State listings generally consider only the status of the species within the State's borders, and do not depend upon the same considerations as a potential Federal listing. Habitat receives protection through county or municipal critical area ordinances. Critical area ordinances require environmental review and habitat management plans for development proposals that affect state-listed species. Washington's Growth Management Act requires counties to develop critical area ordinances that address development impacts to important wildlife habitats. However, the specifics and implementation of critical area ordinances vary by county (see specific discussions below).

The Mazama pocket gopher is a Priority Species under WDFW's Priority Habitats and Species Program (WDFW 2008, pp. 19, 80, 120). As a Priority Species, Mazama pocket gophers benefit from some protection of their habitats under environmental reviews of applications for county or municipal development permits (Stinson 2005, pp. 46, 70). WDFW provides Priority Habitats and Species Management Recommendations to local government permit reviewers, applicants, consultants, and landowners in order to avoid, minimize, and mitigate impacts to Mazama pocket gophers and their habitat (WDFW 2011, p.1). These recommendations are not regulatory, but are based on best available science. As discussed in Factor A, the threat of development is greatest for the four Thurston/Pierce subspecies, but is not known to be a threat to the Olympic, Shelton, or Cathlamet subspecies.

Under the Washington State Forest Practices Act (RCW 76.09 accessed online 2012), WDNR must approve certain activities related to growing, harvesting or processing timber on all local government, State, and privately-owned forest lands. WDNR's mission is to protect public resources while maintaining a viable timber industry. The primary goal of the forest practices rules is to achieve protection of water quality, fish and wildlife habitat, and capital improvements while ensuring that harvested areas are reforested. Presently, the Washington State Forest Practices Rules do not specifically protect Mazama pocket gophers or their habitat. The Shelton and Cathlamet subspecies both occur in areas that would be subject to Washington State Forest Practices Rules. Landowners removing over 5,000 board feet of timber on their ownership, have the option to develop a management plan for a listed species if it resides on their property. If landowners choose to not develop a management plan for the subspecies with WDFW, their forest practices application will be conditioned to protect the relevant subspecies. If this approach does not provide the required protections for the subspecies then WDFW and WDNR may request the Forest Practice Board to initiate rule making, and possibly, an emergency rule would be developed (Whipple 2008, pers. comm.).

The WDNR also manages approximately 66,000 ac (26,710 ha) of lands as Natural Area Preserves (NAP). NAPs provide the highest level of protection for excellent examples of unique or typical land features in Washington State. These NAPs provide protection for the Mazama pocket gopher and based on their proactive management, we do not find the Mazama pocket gophers to be threatened by the inadequacy of existing regulatory mechanisms on WDNR lands.

Based on our review of the existing regulatory mechanisms for the State of Washington, we conclude that while the State's regulations may protect individuals of the subspecies, they do not protect the four Thurston/Pierce subspecies of the Mazama pocket gopher, from further population declines associated with habitat loss or inappropriate management nor do they provide for these subspecies' long-term population viability.

Local Laws and Regulations

The Washington State Growth Management Act of 1990 requires all jurisdictions in the state to designate and protect critical areas. The state defines five broad categories of critical areas, including: (1) Wetlands; (2) areas with a critical recharging effects on aquifers used for potable water; (3) fish and wildlife habitat conservation areas; (4) frequently flooded areas; and (5) geologically hazardous areas. *Quercus garryana* (Oregon white oak) habitat and prairie both predominantly fall into the category of fish and wildlife habitat conservation areas, though due to the coarse nature of prairie soils and the presence of wet prairie habitat across the landscape, critical area protections for crucial aquifer recharge areas and wetlands may also address some prairie habitat protection. As indicated previously, Washington's Growth Management Act requires counties to develop critical area ordinances that address development impacts to important wildlife habitats. The specifics and implementation of critical area ordinances vary by county although the Mazama pocket gopher is recognized as a species of local importance in the critical area ordinances of Pierce, Thurston, and Mason counties. Generally within these areas, when development activities are proposed where gophers are likely to be present, the developer must determine if gophers are present, assess the impact to gophers, and submit a Habitat Assessment Report (Pierce) or Habitat Management Plan (Thurston, Mason). Habitat Management Plans have been developed for gophers for many sites in Thurston County since 2006.

Within counties, the Critical Areas Ordinance (CAO) applies to all unincorporated areas, but incorporated cities are required to independently address critical areas within their Urban Growth Area. The incorporated cities within the range of the Mazama pocket gopher in Washington are: (1) Shelton (Mason County); (2) Roy (Pierce County); and (3) Olympia, Lacey, Tumwater, and Yelm (Thurston County).

In 2009, the Thurston County Board of Commissioners adopted Interim Ordinance No. 14260, which strengthened protections for prairie and Oregon white oak habitat in consideration of the best available science. The County worked with the Service and WDFW to include an up-to-date definition of prairie habitat and to delineate soils where prairie habitat is likely to occur. In July 2010, the ordinance was renewed and amended, including revisions to the prairie soils list and changes to administrative language. Since July 2010, the interim prairie ordinance has been renewed on a 6-month basis and is currently in place. Several prairie species were also included as important species subject to critical areas regulation, including three subspecies of Mazama pocket gophers (for Thurston County, these would be the Olympia, Tenino, and Yelm pocket gophers, although the CAO doesn't separate out subspecies by name) (Thurston County 2012, p. 1).

Implementation of the ordinances includes delineation of prairie soils at the time of any land use application. County staff use the presence of prairie soils and soils identified as Mazama pocket gopher habitat as well as known presence of these subspecies to determine whether prairie habitat may be present at a site and impacted by the land use activity. After a field review, if prairie habitat or one of these subspecies is found on the site, the County requires a habitat management plan (HMP) to be developed, typically

by a consultant for the landowner, in accordance with WDFW's Priority Habitats and Species Management Recommendations. This HMP specifies how site development should occur, and assists developers in achieving compliance with CAO requirements to minimize impact to the prairie habitat and species. The HMPs typically include onsite fencing and semi-annual mowing. Mitigation for prairie impacts may also be required, on-site or off (Thurston County 2012, p. 2). WDFW biologists are not required to review or approve the HMP for adequacy and usually are not privy to the recommendations in final Plan. Subsequently, the County may vacate all or part of the HMP if it determines a reasonable use exception (discussed towards the end of this section) is appropriate.

In Clallam, Pierce, and Mason Counties, specific CAOs have not been identified for the Olympic, Shelton, or Roy Prairie subspecies of Mazama pocket gopher. However, prairie habitats and species garner some protection under Fish (or Aquatic) and Wildlife Habitat Conservation Areas (Mason County 2009, p. 64; Clallam County 2012, Part Three, entire; Pierce County 2012, pp. 18E.40–1–3). All developments within these areas are required to: preserve and protect habitat adequate to support viable populations of native wildlife (Clallam County 2012, Part Three, entire); to achieve ''no net loss'' of species and habitat where, if altered, the action may reduce the likelihood that these species survive and reproduce over the long term (Pierce County 2012, p. 18E.40–1); and support viable populations and protect habitat for Federal or State listed fish or wildlife (Mason County 2009, p. 63).

Due to its State-listed status in Washington, gophers are included in three county CAOs in the State. Actions in gopher habitat under such ordinances are intended to protect and minimize impacts to gophers and their habitats. As such, development applications in suspected gopher areas have spurred surveys and habitat assessments by WDFW or contractors in Mason, Pierce, and Thurston Counties. While survey techniques are more-or-less consistent from site to site, potential development properties found to be occupied by gophers are subject to varied species protection measures. These measures have included habitat set-asides, on-site fencing, signage, and suggested guidelines for long-term management. These measures are inadequate for protecting the site from nonnative predators, ensuring long-term habitat functioning or population viability, providing connectivity to adjacent habitat areas, or prompting corrective management actions if the biological functioning of the set-aside declines.

Measures are implemented with varying degrees of biological assessment, evaluation, and monitoring to ensure ecological success. If a site is found to be occupied by Mazama pocket gophers and unless a reasonable use exception is determined by the County, development properties are required to set aside fenced, signed areas for pocket gopher protection that must be maintained into the future. However, fencing often doesn't exclude predators, and the size of the set-asides may not be large enough to sustain a population of gophers over time. Additionally, there appears to be no mechanism in place for oversight to ensure that current and future landowners are complying with the habitat maintenance requirements, so within these set-asides, pocket gopher habitat may become unsuitable over time. Legal procedures to ensure performance, permanency, funding, and enforcement for long-term site stewardship are inadequate, or are nonexistent (Defobbis 2011, *in litt.*). Consequently, for the Mazama pocket gophers impacted by development (the four Thurston/Pierce subspecies), the contribution of these sites to maintaining pocket gopher populations and viability is unreliable for long-term conservation.

For a few property owners in Thurston County, the size of the set-aside would have precluded the proposed use of the properties. In these cases, landowners were granted a ''reasonable use exception,'' allowing development to proceed. In some cases, gophers that could be live-trapped have been moved (translocated) to other locations. These were termed emergency translocations. In cases such as this, or where the set-aside doesn't wholly overlap all occupied habitat, destruction of occupied habitats (due to building construction, grading or paving over, etc.) likely results in death of individuals due to the gopher's underground existence and sedentary nature, which makes them vulnerable in situations where their burrows are crushed.

County-level CAOs do not apply to incorporated cities within county boundaries, thus the incorporated cities of Olympia, Lacey, Tumwater, Yelm, Tenino, and Rainier that overlap the range of the four Thurston/Pierce subspecies of Mazama pocket gopher do not provide the same specificity of protection as the Thurston County CAO. Below we address the relevant city ordinances that overlap the species' range. We conclude below with a summary of whether we deem these city ordinances as they are tied to the County-level ordinances are adequate for the conservation of the four Thurston/Pierce subspecies of Mazama pocket gopher.

The City of Olympia. The City of Olympia's municipal code states that ''The Department [City] may restrict the uses and activities of a development proposal which lie within one thousand feet of important habitat or species location,'' defined by Washington State's Priority Habitat and Species (PHS) Management Recommendations of 1991, as amended'' (Olympia Municipal Code (OMC) 18.32.315 B). When development is proposed within 1,000 feet of habitat of a species designated as important by Washington State, the Olympia CAO requires the preparation of a formal ''Important Habitats and Species Management Plan'' unless waived by the WDFW (OMC 18.32.320).

The City of Lacey. The City of Lacey CAO includes in its definition of ''critical area'' any area identified as habitat for a Federal or State endangered, threatened, or sensitive species or State-listed priority habitat, and calls these Habitat Conservation Areas (HCAs) (Lacey Municipal Code (LMC) 14.33.060). These areas are defined through individual contract with qualified professional biologists on a site-by-site basis as development is proposed. The code further states that, ''No development shall be allowed within a habitat conservation area or buffer [for a habitat conservation area] with which state or federally endangered, threatened, or sensitive species have a primary association'' (LMC 14.33.117).

The City of Tumwater. The City of Tumwater CAO outlines protections for HCAs and for ''habitats and species of local importance.'' Tumwater's HCAs are established on a case-by-case basis by a ''qualified professional'' as development is proposed and the HCAs are required to be consistent with the recommendations issued by the Washington State Department of Fish and Wildlife (Tumwater Municipal Code (TMC) 16.32.60). Species of local importance are defined as locally significant species that are not State-listed as threatened, endangered, or sensitive, but live in Tumwater and are of special importance to the citizens of Tumwater for cultural or historical reasons, or if the City is a critically significant portion of its range (TMC 16.32.055 A). Tumwater is considered a ''critically significant portion of a species' range'' if the species'

population would be divided into nonviable populations if it is eliminated from Tumwater'' (TMC 16.32.055 A2). Species of local importance are further defined as State monitor or candidate species where Tumwater is a significant portion of its range such that a significant reduction or elimination of the species from Tumwater would result in changing the status of the species to that of State endangered, threatened, or sensitive (TMC 16.32.055 A3).

The City of Yelm. The municipal code of Yelm states that it will ''regulate all uses, activities, and developments within, adjacent to, or likely to affect one or more critical areas, consistent with the best available science'' (Yelm Municipal Code (YMC) 14.08.010 E4f) and mandates that ''all actions and developments shall be designed and constructed to avoid, minimize, and restore all adverse impacts.'' Further, it states that, ''no activity or use shall be allowed that results in a net loss of the functions or values of critical areas'' (YMC 14.08.010 G) and ''no development shall be allowed within a habitat conservation area or buffer which state or federally endangered, threatened, or sensitive species have a primary association, except that which is provided for by a management plan established by WDFW or applicable state or federal agency'' (YMC 14.080.140 D1a). The City of Yelm municipal code states that by ''limiting development and alteration of critical areas'' it will ''maintain healthy, functioning ecosystems through the protection of unique, fragile, and valuable elements of the environment, and * * * conserve the biodiversity of plant and animal species'' (17.08.010 A4b).

The City of Tenino. The City of Tenino municipal code gives Development Regulations for Critical Areas and Natural Resource Lands that include fish and wildlife habitat areas (Tenino Municipal Code (TMC) 18D.10.030 A) and further ''protects unique, fragile, and valuable elements of the environment, including critical fish and wildlife habitat'' (TMC 18D.10.030 D). The City of Tenino references the WDNR Critical Areas Fish and Wildlife Habitat Areas-Stream Typing Map and the WDFW PHS Program and PHS Maps as sources to identify fish and wildlife habitat (TMC 18D.10.140 E1, 2). The City also defines critical fish and wildlife species habitat areas as those areas known to support or have ''a primary association with State or Federally listed endangered, threatened, or sensitive species of fish or wildlife (specified in 50 CFR 17.11, 50 CFR 17.12, WAC 232–12–011) and which, if altered, may reduce the likelihood that the species will survive and reproduce over the long term'' (TMC 18D.40.020A, B).

The City of Rainier. The City of Rainier municipal code identifies ''critical areas as defined by RCW 36.70A.030 to include * * * fish and wildlife habitat areas'' (Rainier Municipal Code (RMC) 18.100.030A) and further ''protects unique, fragile, and valuable elements of the environment, including critical fish and wildlife habitat'' (RMC 180.100.030D). The City of Rainier mandates protective measures that include avoiding impact to critical areas first and mitigation second (RMC 18.100.B030B). Fish and wildlife habitat critical areas may be designated either by a contracted ''qualified professional'' or a qualified city employee (RMC 18.100.H040H).

The City of Shelton. The CAO for the city of Shelton (Mason County) specifies compliance with the PHS through designation of habitat conservation areas (HCAs) (Shelton Municipal Code (SMC) 21.64.300 B1), indicating that where HCAs are designated, development will be curtailed (SMC 21.64.010 B) except at the discretion of the director (city), who may allow single-family development at such sites without a critical areas assessment report if development is not believed to directly disturb the components of the HCA (SMC 21.64.360 B).

The City of Roy. The CAO for the city of Roy (Pierce County) defines HCAs according to WDFW PHS (Roy Municipal Code (RMC) 10–5E1 C), alongside habitats and species of local importance as identified by the City (RMC 10–5E1 D). HCAs are delineated by qualified professional fish and wildlife biologists (RMC 10–5–9 A5). These HCAs are subject to mitigation if direct impacts to the HCA are unavoidable (RMC 10–5–13 E3).

Summary. City and County CAOs have been crafted to preserve the maximum amount of biodiversity while at the same time encouraging high density development within their respective Urban Growth Areas. City and County CAOs require that potential fish and wildlife habitat be surveyed by qualified professional habitat biologists as development is proposed (with the exception of Rainier, where a qualified city staffer may complete the survey). An HCA is determined according to the WDFW PHS list, which is associated with WDFW management recommendations for each habitat and species. If an HCA is identified at a site, the development of the parcel is then subject to the CAO regulations. Mitigation required by each City or County CAO prioritizes reconsideration of the proposed development action in order to avoid the impact to the HCA.

These efforts are laudable, but are unlikely to prevent isolation of local populations of sensitive species. Increased habitat fragmentation and degradation, decreased habitat connectivity and pressure from onsite and offsite factors are not fully taken into consideration in the establishment of these mitigation sites. This may be due to a lack of standardization in assessment protocols, though efforts have been made on the part of the WDFW to implement training requirements for all ''qualified biologists'' who survey for pocket gopher presence or absence. Variability in the expertise and training of ''qualified habitat biologists'' has led to broad variation in the application of CAO guidelines in completion of the HMPs. Coupled with the lack of requirement for WDFW to review and approve every HMP, this variability in expertise and training does not appear to equally or adequately support the conservation of Mazama pocket gophers.

Connectivity of populations, abundance of resources (e.g. food plants), and undisturbed habitat are three primary factors affecting plant and animal populations. The piecemeal pattern that development unavoidably exhibits is difficult to reconcile with the needs of the Mazama pocket gopher within a given Urban Growth Area. Further, previously-common species may become uncommon due to disruption by development, and preservation of small pockets of habitat is unlikely to prevent extirpation of some species without intensive species management, which is beyond the scope of individual CAOs. The four Thurston/Pierce subspecies of Mazama pocket gopher are affected by habitat loss through development and conversion. Protective measures undertaken while development of lands is taking place may provide benefits for these species; however, based on our review of the Washington County and State regulatory mechanisms, we conclude that these measures are currently inadequate to protect the the four Thurston/Pierce subspecies of Mazama pocket gopher from further population declines associated with habitat loss, inappropriate management and loss of connectivity. We do not have any information to suggest that the inadequacy of existing regulatory mechanisms poses a threat to the Olympic, Shelton, or Cathlamet subspecies of Mazama pocket gopher.

Summary of Factor D

In summary, the existing regulatory mechanisms described above are not sufficient to significantly reduce or remove the existing threats to the four Thurston/Pierce subspecies of Mazama pocket gopher. Lack of essential habitat protection under State laws leaves these subspecies at continued risk of habitat loss and degradation.

On JBLM, military training, as it currently occurs, causes direct mortality of individuals and impacts habitat for the Roy Prairie and Yelm subspecies of Mazama pocket gopher in all areas where training and the species overlap. However, we expect (based on our ongoing technical assistance), that the Final ESMPs and revised INRMP will provide greater conservation benefit to the species than this current level of management and will protect Mazama pocket gophers from further population declines associated with habitat loss or inappropriate management on JBLM properties. Therefore, we do not find existing regulatory mechanisms to be inadequate for the subspecies on JBLM lands.

The Washington CAOs generally provide conservation measures to minimize habitat removal and direct effects to the Mazama pocket gopher. However, habitat removal and degradation, direct loss of individuals, increased fragmentation, decreased connectivity, and the lack of consistent regulatory mechanisms to address the threats associated with these effects continues to occur, particularly for the four Thurston/Pierce subspecies of Mazama pocket gopher.

Based upon our review of the best commercial and scientific data available, we conclude that the existing regulatory mechanisms are inadequate to reduce the threats to the four Thurston/Pierce subspecies of Mazama pocket gopher now or in the future. Based on our review, we have no information to suggest that the inadequacy of existing regulatory mechanisms poses a threat to the Olympic, Shelton, or Cathlamet subspecies of Mazama pocket gopher.

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

Low Genetic Diversity, Small or Isolated Populations, and Low Reproductive Success

Most species' populations fluctuate naturally, responding to various factors such as weather events, disease, and predation. Johnson (1977, p. 3), however, suggested that these factors have less impact on a species with a wide and continuous distribution. Populations that are small, fragmented, or isolated by habitat loss or modification of naturally patchy habitat, and other human-related factors, are more vulnerable to extirpation by natural randomly occurring events, cumulative effects, and to genetic effects that plague small populations, collectively known as small population effects. These effects can include genetic drift (loss of recessive alleles), founder effects (over time, an increasing percentage of the population inheriting a narrow range of traits), and genetic bottlenecks leading to increasingly lower genetic diversity, with consequent negative effects on evolutionary potential.

To date, of the eight subspecies of Mazama pocket gopher in Washington, only the Olympic pocket gopher has been documented as having low genetic diversity (Welch and Kenagy 2008, p. 7), although the other seven subspecies have local populations that are small, fragmented, and physically isolated from one another. The four Thurston/Pierce subspecies face threats from further loss or fragmentation of habitat. Historically, Mazama pocket gophers probably persisted by continually recolonizing habitat patches after local extinctions. This process, in concert with widespread development and conversion of habitat, has resulted in widely separated populations since intervening habitat corridors are now gone, likely stopping much of the natural recolonization that historically occurred (Stinson 2005, p. 46). Although the Mazama pocket gopher (except for the Olympic pocket gopher) is not known to have low genetic diversity small population sizes in most sites coupled with disjunct and fragmented habitat may contribute to further population declines, specifically for the four Thurston/Pierce subspecies of Mazama pocket gopher. Little is known about the local or rangewide reproductive success of Mazama pocket gophers in Washington.

Climate Change

Our analyses under the Act include consideration of ongoing and projected changes in climate. The terms ''climate'' and ''climate change'' are defined by the Intergovernmental Panel on Climate Change (IPCC). The term ''climate'' refers to the mean and variability of different types of weather conditions over time, with 30 years being a typical period for such measurements, although shorter or longer periods also may be used (IPCC 2007a, p. 78). The term ''climate change'' thus refers to a change in the mean or variability of one or more measures of climate (e.g., temperature or precipitation) that persists for an extended period, typically decades or longer, whether the change is due to natural variability, human activity, or both (IPCC 2007a, p. 78).

Scientific measurements spanning several decades demonstrate that changes in climate are occurring, and that the rate of change has been faster since the 1950s. Examples include warming of the global climate system, substantial increases in precipitation in some regions of the world, and decreases in other regions. (For these and other examples, see IPCC 2007a, p. 30; and IPCC 2007d, pp. 35–54, 82–85.) Results of scientific analyses presented by the IPCC show that most of the observed increase in global average temperature since the mid-20th century cannot be explained by natural variability in climate, and is ''very likely'' (defined by the IPCC as 90 percent or higher probability) due to the observed increase in greenhouse gas (GHG) concentrations in the atmosphere as a result of human activities, particularly carbon dioxide emissions from use of fossil fuels (IPCC 2007a, pp. 5–6 and figures SPM.3 and SPM.4; IPCC 2007d, pp. 21–35). Further confirmation of the role of GHGs comes from analyses by Huber and Knutti (2011, p. 4), who concluded it is extremely likely that approximately 75 percent of global warming since 1950 has been caused by human activities.

Scientists use a variety of climate models, which include consideration of natural processes and variability, as well as various scenarios of potential levels and timing of GHG emissions, to evaluate the causes of changes already observed and to project future changes in temperature and other climate conditions (e.g., IPCC 2007c, entire; Ganguly *et al.* 2009, pp. 11555, 15558; Prinn *et al.* 2011, pp. 527, 529). All combinations of models and emissions scenarios yield very similar projections of increases in the most common measure of climate change, average global surface temperature (commonly known as global warming), until about 2030. Although projections of the extent and rate of warming differ after about 2030, the overall trajectory of all the projections is one of increased global warming through the end of this century, even for the projections based on scenarios that assume that GHG emissions will stabilize or decline. Thus, there is strong scientific support for projections that warming will continue through the 21st century, and that the scope and rate of change will be influenced substantially by the extent of GHG emissions (IPCC 2007a, pp. 44–45;

IPCC 2007c, pp. 760–764 and 797–811; Ganguly *et al.* 2009, pp. 15555–15558; Prinn *et al.* 2011, pp. 527, 529). (See IPCC 2007b, p. 8, for a summary of other global projections of climate-related changes, such as frequency of heat waves and changes in precipitation. Also see IPCC 2011(entire) for a summary of observations and projections of extreme climate events.)

Various changes in climate may have direct or indirect effects on species. These effects may be positive, neutral, or negative, and they may change over time, depending on the species and other relevant considerations, such as interactions of climate with other variables (e.g., habitat fragmentation) (IPCC 2007e, pp. 214–246). Identifying likely effects often involves aspects of climate change vulnerability analysis. Vulnerability refers to the degree to which a species (or system) is susceptible to, and unable to cope with, adverse effects of climate change, including climate variability and extremes. Vulnerability is a function of the type, scope, and rate of climate change and variation to which a species is exposed, its sensitivity, and its adaptive capacity (IPCC 2007a, p. 89; see also Glick *et al.* 2011, pp. 19–22). There is no single method for conducting such analyses that applies to all situations (Glick *et al.* 2011, p. 3). We use our expert judgment and appropriate analytical approaches to weigh relevant information, including uncertainty, in our consideration of various aspects of climate change.

As is the case with all threats that we assess, even if we conclude that a species is currently affected or is likely to be affected in a negative way by one or more climate-related impacts, it does not necessarily follow that the species meets the definition of an ''endangered species'' or a ''threatened species'' under the Act. If a species is listed as endangered or threatened, knowledge regarding the vulnerability of the species to, and known or anticipated impacts from, climate-associated changes in environmental conditions can be used to help devise appropriate strategies for its recovery.

Global climate projections are informative, and, in some cases, the only or the best scientific information available for us to use. However, projected changes in climate and related impacts can vary substantially across and within different regions of the world (e.g., IPCC 2007a, pp. 8–12). Therefore, we use ''downscaled'' projections when they are available and have been developed through appropriate scientific procedures, because such projections provide higher resolution information that is more relevant to spatial scales used for analyses of a given species (see Glick *et al.* 2011, pp. 58–61, for a discussion of downscaling). With regard to our analysis for the Mazama pocket gopher, downscaled projections are available.

The ranges of the Mazama pocket gopher subspecies extend from the Olympic Peninsula down through the Puget Sound trough. Downscaled climate change projections for this ecoregion predict consistently increasing annual mean temperatures from 2012 to 2095 using the IPCC's medium (A1B) emissions scenario (IPCC 2000, p. 245). Using the General Circulation Model (GCM) that most accurately predicts precipitation for the Pacific Northwest, the Third Generation Coupled Global Climate Model (CGCM3.1) under the medium emissions scenario (A1B), annual mean temperature is predicted to increase approximately 1.8 °Fahrenheit (F) (1 °Celsius (C)) by the year 2020, 3.6 °F (2 °C) by 2050, and 5.4 °F (3 °C) by 2090 (Climatewizardcustom 2012). This analysis was restricted to the ecoregion encompassing the overlapping range of the species of interest and is well supported by analyses focused only on the Pacific Northwest by Mote and Salathé in their 2010 publication, Future Climate in the Pacific Northwest (Mote and Salathé 2010, entire). Employing the same GCM and medium emissions scenario, downscaled model runs for precipitation in the ecoregion project a small (less than 5 percent) increase in mean annual precipitation over approximately the next 80 years. Most months are projected to show an increase in mean annual precipitation. May through August are projected to show a decrease in mean annual precipitation, which corresponds with the majority of the reproductive season for the Mazama pocket gopher (Climatewizardcustom 2012).

The potential impacts of a changing global climate to the Mazama pocket gopher are presently unclear. Projections localized to the Georgia Basin—Puget Sound Trough—Willamette Valley Ecoregion suggest that temperatures are likely to increase approximately 5 °F (2.8 °C) at the north end of the region by the year 2080 based on an average of greenhouse gas emission scenarios B1, A1B, and A2 and all Global Circulation Models employed by Climatewizard (range = 2.6 °F to 7.6 °F; 1.4 °C to 4.2 °C). Similarly, the mid region projection predicts an increase an average of 4.5 °F (range = 2.1 °F to 7.1 °F; average of 2.5 °C with a range of 1.2 °C to 3.9 °C) and the southern end to increase by 4.5 °F (range = 2.2 °F to 7.1 °F; average of 2.5 °C with a range of 1.2 °C to 3.9 °C). Worldwide, the IPCC states it is very likely that extreme high temperatures, heat waves, and heavy precipitation events will increase in frequency (IPCC 2007c, p. 783).

Climate change has been linked to a number of conservation issues and changes in animal populations and ranges. However, direct evidence that climate change is the cause of these alterations is often lacking (McCarty 2001, p. 327). The body of work examining the response of small mammals to climate change is small and is primarily focused on reconstruction of mammalian communities through the comparison of small mammal fossils from the late Pleistocene to those of the Holocene, a time period that spans the last significant climate warming event that took place between 15,000 and 11,000 years ago (Blois *et al.* 2010, entire; Terry *et al.* 2011, entire). Paleontological work done by Blois *et al.* (2010, p. 772) in northern California reveals a strong correlation between climate change and the decline and extirpation of small mammal species during the last major global warming event. The loss in species richness (number of taxa) of small mammals at their research site is equal to that documented for large mammal extinctions in North America during the same warming event at the transition from the Pleistocene to the Holocene: 32 percent (Blois *et al.* 2010, p. 772). Blois *et al.* (2010, supplemental data, p. 9) determined that *Thomomys mazama* were more vulnerable to climate change than other *Thomomys* species in the area due to the steep decline of *T. mazama* population numbers that coincided with the first significant warming event around 15,000 years ago and their extirpation from the site around 6,000 years ago.

To explore the potential impacts of climate change within the Anthropocene (the current geologic epoch), Blois (2009, p. 243) constructed a climate niche (the estimated tolerance of environmental variables for a given species) for *Thomomys mazama* reflecting the average minimum and average maximum temperatures range wide. Blois used climate data compiled by PRISM Group, Oregon State University, for the years 1971–2000, to construct the climate niche. Temperatures given are mean annual temperatures based on mean monthly averages. The climate niche Blois constructed for the Mazama pocket gopher gives 22.3 °F (−5.4 °C) for the lowest of the mean annual minimum temperatures across all localities and 66.9 °F (19.4 °C) for the highest of the

mean annual maximum temperatures across all localities where Mazama pocket gophers are found. Minimum and maximum temperatures above the surface of the soil are attenuated with increased soil depth. It is unknown as to whether or not Mazama pocket gophers are able to regulate the temperature in their burrow system by digging deeper in the soil; however, it is likely that any temperature changes experienced by pocket gophers underground are attenuated relative to observed changes in surface temperatures.

The effects of climate change may be buffered by pocket gophers' fossorial lifestyle and are likely to be restricted to indirect effects in the form of changes in vegetation structure and subsequent habitat shifts through plant invasion and encroachment (Blois 2009, p. 217). Further, the impacts of climate change on western Washington are projected to be less severe than in other parts of the country. While overall annual average precipitation in western Washington is predicted to increase, seasonal precipitation is projected to become increasingly variable, with wetter and warmer winter and springs and drier, hotter summers (Mote and Salathé 2010, p. 34; Climatewizard 2012). These shifts in temperature, precipitation, and soil moisture may result in changes in the vegetation structure through woody invasion and encroachment and thus affect the habitat for all pocket gopher species and subspecies in the region. Despite this potential for future environmental changes, we have not identified nor are we aware of any data on an appropriate scale to evaluate habitat or populations trends for the Mazama pocket gopher subspecies or to make predictions about future trends and whether the species will be significantly impacted by climate change.

Stochastic Weather Events

Stochasticity of extreme weather events may impact the ability of threatened and endangered species to survive. Vulnerability to weather events can be described as being composed of three elements; exposure, sensitivity, and adaptive capacity.

The small, isolated nature of the remaining populations of Mazama pocket gophers increases the species' vulnerability to stochastic (random) natural events. When species are limited to small, isolated habitats, they are more likely to become extinct due to a local event that negatively affects the population. While a population's small, isolated nature does not represent an independent threat to the species, it does substantially increase the risk of extirpation from the effects of all other threats, including those addressed in this analysis, and those that could occur in the future from unknown sources.

The impact of stochastic weather and extreme weather events on pocket gophers is difficult to predict. Pocket gophers may largely be buffered from these impacts due to their fossorial lifestyle, but Case and Jasch (1994, p. B–21) connect sharp population declines of pocket gophers of several genera with stochastic weather events such as heavy snow cover and rapid snowmelt with a corresponding rise in the water table. Based on our review, we found no information to indicate that the effects of stochastic weather events are a threat to any of the Washington subspecies of Mazama pocket gopher.

Pesticides and Herbicides

The Mazama pocket gopher is not known to be impacted by pesticides or herbicides directly, but may be impacted by the equipment used to dispense them. These impacts are covered under Factor A.

Control as a Pest Species

Pocket gophers are often considered a pest because they sometimes damage crops and seedling trees, and their mounds can create a nuisance. Several site locations in the WDFW wildlife survey database were found as a result of trapping on Christmas tree farms, a nursery, and in a livestock pasture (WDFW 2001). For instance, the type locality for the Cathlamet pocket gopher is on a commercial tree farm. Mazama pocket gophers in Washington were also used in a rodenticide experiment as recently as 1995 (Witmer *et al.* 1996, p. 97).

In Washington it is currently illegal to trap or poison pocket gophers or trap or poison moles where they overlap with Mazama pocket gopher populations, but not all property owners are cognizant of these laws, nor are most citizens capable of differentiating between mole and pocket gopher soil disturbance. In light of this, it is reasonable to believe that mole trapping or poisoning efforts still have the potential to adversely affect pocket gopher populations. Local populations of Mazama pocket gophers that survive commercial and residential development (adjacent to and within habitat) may be subsequently extirpated by trapping or poisoning by humans. Lethal control by trapping or poisoning is most likely a threat to the four Thurston/Pierce subspecies, where they overlap residential properties. Trapping or poisoning is not a threat to the Olympic pocket gopher, which resides wholly within the Olympic National Park.

It is unknown if this may be a threat to the Cathlamet or Shelton pocket gophers, which are found largely on commercial timber lands or on Port of Shelton lands. Commercial timber landowners are likely to trap or poison gophers in areas where it is otherwise legal and where gophers are limiting tree seedling growth. This has not been a reported problem in either county. Shelton and Cathlamet pocket gophers are State-listed and thus lethal control is illegal without a permit. Port of Shelton is aware that gophers occur on their property, is operating under a gopher habitat management plan, and have not used lethal control there since gophers don't directly impact their operations. We found no information to indicate that control as a pest species is a threat to the Shelton or Cathlamet subspecies of Mazama pocket gopher.

Recreation

The Mazama pocket gopher is not known to be impacted by recreation activities, although predation by domestic dogs associated with recreational activities does occur (Clause 2012, pers. comm.). These impacts are covered under Predation in Factor C.

Summary of Factor E

Based upon our review of the best commercial and scientific data available, the loss, degradation, and fragmentation of prairies has resulted in smaller local population sizes, loss of genetic diversity, reduced gene flow among populations, destruction of population structure, and increased susceptibility to local population extirpation for the four Thurston/Pierce subspecies of Mazama pocket gopher from a series of threats including poisoning and trapping, as summarized below.

Small population sizes coupled with disjunct and fragmented habitat may contribute to further population declines, specifically for the four Thurston/Pierce subspecies of Mazama pocket gopher, which occur in habitats that face continuing fragmentation due to development.

Mole trapping or poisoning efforts have the potential to adversely affect the four Thurston/Pierce subspecies, especially where they abut commercial and residential areas. Such efforts may have a particularly negative impact on these pocket gopher populations since they are already small and isolated.

Due to small population effects caused by fragmentation of habitat, and impacts from trapping and poisoning

efforts, we find that the threats associated with other natural or manmade factors are significant for the four Thurston/Pierce subspecies of Mazama pocket gopher.

Based on the best available scientific and commercial information, we found no evidence to suggest that any of the factors considered here pose a threat to the Olympic, Shelton, or Cathlamet subspecies of Mazama pocket gopher.

Proposed Determination

The four Thurston/Pierce subspecies of Mazama pocket gopher. The four Thurston/Pierce subspecies historically ranged across the open prairies and grasslands of the south Puget Sound (Dalquest and Scheffer 1942, pp. 95–96). In the south Puget Sound region, where most of western Washington's prairies historically occurred, and where the four Thurston/Pierce subspecies occur, less than 10 percent of the original prairie persists (Crawford and Hall 1997, pp. 13–14). These four subspecies have varying degrees of impacts acting on them.

For the four Thurston/Pierce subspecies, we find that both development and fire suppression have caused the loss of a majority of prairie habitats or made such habitat unavailable to gophers due to encroachment of native and nonnative species of plants. These significant impacts are expected to continue into the foreseeable future. Impacts from military training, affecting large local populations of the Roy Prairie and Yelm pocket gopher on JBLM, are expected to increase under the DOD's Grow the Army initiative although we expect that JBLM's final ESMPs will provide an overall conservation benefit to the species. Predation of gophers by feral and domestic cats and dogs has occurred and is expected to increase with increased residential development on prairie soils occupied by gophers. This is of particular concern for the four Thurston/Pierce subspecies.

We find that the threat of development and adverse impacts to habitat from conversion to other uses, the loss of historically occupied locations resulting in the present isolation and limited distribution of the species, the impacts of military training, existing and likely future habitat fragmentation, land use changes, long-term fire suppression, and the threats associated with the present and threatened destruction, modification, and curtailment of the four Thurston/Pierce subspecies habitat is significant. We conclude that there are likely to be significant, ongoing threats to the subspecies due to factors such as small population effects (risk of population loss due to catastrophic or stochastic events), poisoning, and trapping. The small size of most of the remaining local populations, coupled with disjunct and fragmented habitat, may render them increasingly vulnerable to additional threats such as those mentioned above.

The four Thurston/Pierce subspecies face a combination of several high-magnitude threats; the threats are immediate; these subspecies are highly restricted in their ranges; the threats occur throughout the subspecies' ranges and are not restricted to any particular significant portion of those ranges. Therefore, we assessed the status of each of these subspecies throughout their entire ranges and our assessment and proposed determination will apply to these subspecies throughout their entire ranges. For the reasons provided in this rule we propose that the four Thurston/Pierce subspecies (*Thomomys mazama pugetensis, glacialis, tumuli,* and *yelmensis*—the Olympia, Roy Prairie, Tenino, and Yelm pocket gophers, respectively) be listed as threatened throughout their ranges.

The Act defines an endangered species as any species that is ''in danger of extinction throughout all or a significant portion of its range'' and a threatened species as any species ''that is likely to become endangered throughout all or a significant portion of its range within the foreseeable future.'' We find that the four Thurston/Pierce subspecies (*Thomomys mazama pugetensis, glacialis, tumuli,* and *yelmensis*) are likely to become endangered species throughout all or a significant portion of their ranges within the foreseeable future, based on the immediacy, severity, and scope of the threats described above. We do not, however, have information to suggest that the present threats are of such great magnitude that any of these four subspecies are in immediate danger of extinction, but are likely to become so in the foreseeable future. Therefore, on the basis of the best available scientific and commercial information, we determine that *T. m. pugetensis, glacialis, tumuli,* and *yelmensis* meet the definition of threatened species in accordance with sections 3(20) and 4(a)(1) of the Act.

This proposal is based on current information about the location, status and threats for these subspecies. If new information is found which results in an expanded range of habitats used by the subspecies, or a different level of threats, we will consider that information in the final rule.

Olympic pocket gopher. The Olympic pocket gopher occupies isolated alpine meadows in the Olympic National Park in Clallam County. We find that the effects due to small or isolated populations have likely had negative impacts to the subspecies. This low-magnitude threat is not known to be imminent, though it may continue into the foreseeable future. This species also exhibits low genetic diversity. This is also a low-magnitude threat, is ongoing and likely to continue into the foreseeable future. This subspecies is highly restricted in its range, the few threats identified occur throughout its range, and the threats are not restricted to any particular portion of its range. However, none of the threats faced by the Olympic pocket gopher are particularly grave or immediate, and we do not have information to suggest that the subspecies is suffering from any recent declines in abundance or distribution. Occurring entirely within the boundaries of a National Park, the Olympic pocket gopher is secure from many of the threats facing the other Washington subspecies, such as habitat loss to development, encroachment by woody vegetation, or predation by feral cats and dogs. The best available information indicates that the threats identified for the Olympic pocket gopher are relatively minor and are not resulting in population level effects such that the subspecies is currently in danger of extinction, or likely to become so within the foreseeable future. Therefore, we find that the Olympic subspecies *(Thomomys mazama melanops)* does not meet the definition of an endangered or a threatened species and therefore does not warrant listing under the Act.

Shelton pocket gopher. The Shelton pocket gopher used to range across the open prairies and grasslands of Mason County, and is now also known to inhabit low-elevation meadow-type areas in Mason County. We find that the effects due to small or isolated populations have likely had negative impacts to the subspecies. This low-magnitude threat is not known to be imminent, though it may continue into the foreseeable future. This subspecies is highly restricted in its range, the few threats identified occur throughout its range, and the threasts are not restricted to any particular portion of its range. Although likely impacted by development in the past, we have no information to suggest that future development poses a threat to this subspecies, and beneficial management plans are in place for some of the larger populations of the Shelton pocket gopher.

This subspecies is not currently affected by many of the threats that have

had severe impacts on other Washington subspecies of Mazama pocket gopher, such as habitat loss due to residential or commercial development, encroachment of woody vegetation, or predation by cats and dogs. We have no evidence that the Shelton pocket gopher is experiencing population-level effects from the threats identified, and new local populations of the subspecies have been identified. Based on the best available information, we conclude that the threats faced by the Shelton pocket gopher are relatively minor and that the subspecies is not currently in danger of extinction, or likely to become so within the foreseeable future. Therefore, we find that the Shelton subspecies *(Thomomys mazama couchi)* does not meet the definition of an endangered or a threatened species and therefore does not warrant listing under the Act.

Cathlamet pocket gopher. The Cathlamet pocket gopher occurs in low-elevation meadow-type areas in Wahkiakum County. The subspecies is found in a limited-extent soil type on commercial timber lands. In the Service's review of this species previously (USFWS 2010, pp. 5–6), it was characterized as likely extinct. However, based on our further review of information, we determined that further surveys of the type locality and surrounding area are needed to determine the status of this subpopulation as thorough surveys of all potential habitat were never conducted. In addition, land use within the type locality has remained the same since the subspecies was discovered in 1949 (Gardner 1950), suggesting that the subspecies may remain extant.

We find that the effects due to small or isolated populations may have had negative impacts to the subspecies. However, this low-magnitude threat is not known to be imminent, though it will likely continue into the future. The range and distribution of the Cathlamet pocket gopher has not been completely surveyed and its type locality still exists. Based on the available information, we do not have evidence that the subspecies is impacted at a population level and believe that any threats to the species are minor and are not restricted to any particular portion of its range. For these reasons and those discussed under the Factor analyses previously, we have determined that the Cathlamet subspecies *(Thomomys mazama louiei)* does not meet the definition of an endangered or a threatened species and therefore does not warrant listing under the Act.

Distinct Population Segment and Significant Portion of the Range for the Four Thurston/Pierce Subspecies of Mazama Pocket Gopher

Having determined that the four Thurston/Pierce subspecies of Mazama pocket gopher meet the definition of threatened species throughout their ranges, we must next consider whether a distinct population segment of any of these subspecies may be an endangered species in accordance with the Service's Policy Regarding the Recognition of Distinct Vertebrate Population Segments under the Endangered Species Act (61 FR 4722, February 7, 1996), or whether any significant portions of the ranges of the subspecies exist where they are in danger of extinction. Because the range is so small for each of these subspecies and we have considered the threats throughout the range of each subspecies, we believe there is no relevant portion of any of the subspecies' ranges that could be justified as a separate Distinct Population Segment or significant portion of the range. In addition, our evaluation did not indicate that threats for any of the subspecies were particularly concentrated or more severe within any geographic subset of the subspecies' range.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Listing results in recognition and public awareness and conservation by Federal, State, Tribal, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required by Federal agencies and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act requires the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning includes the development of a recovery outline shortly after a species is listed, preparation of a draft and final recovery plan, and revisions to the plan as significant new information becomes available. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. The recovery plan identifies site-specific management actions that will achieve recovery of the species, measurable criteria that determine when a species may be downlisted or delisted, and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (comprised of species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our Web site (*http://www.fws.gov/endangered*), or from our Washington Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribal, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (e.g., restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

If the four Thurston/Pierce subspecies of Mazama pocket gopher are listed, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the State of Washington would be eligible for Federal funds to implement management actions that promote the protection and recovery of these Mazama pocket gopher subspecies. Information on our grant programs that

are available to aid species recovery can be found at: *http://www.fws.gov/grants.*

Although the four Thurston/Pierce subspecies of Mazama pocket gopher are only proposed for listing under the Act at this time, please let us know if you are interested in participating in recovery efforts for these species. Additionally, we invite you to submit any new information on these species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

Federal agency actions within the species habitat that may require conference or consultation or both as described in the preceding paragraph include actions to manage or restore critical habitat, actions that require collecting or handling the species for the purpose of captive propagation and translocation to new habitat, actions that may negatively affect the species through removal, conversion, or degradation of habitat. Examples of activities conducted, regulated or funded by Federal agencies that may affect listed species or their habitat include, but are not limited to:

(1) Military training activities and operations conducted in or adjacent to occupied or suitable habitat on DOD lands;

(2) Activities with a Federal nexus that include vegetation management such as burning, mechanical treatment, and/or application of herbicides/pesticides on Federal, State, or private lands;

(3) Ground-disturbing activities regulated, funded or conducted by Federal agencies in or adjacent to occupied and/or suitable habitat; and

(4) Import, export or trade of the species, to name a few.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered wildlife. The prohibitions of section 9(a)(2) of the Act, codified at 50 CFR 17.21 for endangered wildlife, in part, make it illegal for any person subject to the jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these), import, export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any listed species. Under the Lacey Act (18 U.S.C. 42–43; 16 U.S.C. 3371–3378), it is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered and threatened wildlife species under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22 for endangered species, and at 17.32 for threatened species. With regard to endangered wildlife, a permit must be issued for the following purposes: For scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a proposed listing on proposed and ongoing activities within the range of species proposed for listing. The following activities could potentially result in a violation of section 9 of the Act; this list is not comprehensive:

(1) Unauthorized collecting, handling, possessing, selling, delivering, carrying, or transporting of the subspecies, including import or export across State lines and international boundaries, except for properly documented antique specimens of these taxa at least 100 years old, as defined by section 10(h)(1) of the Act;

(2) Introduction of species that compete with or prey upon the Mazama pocket gopher, or its habitat such as the introduction of competing, invasive plants or animals;

(3) Unauthorized modification of the soil profiles or the vegetation components on sites known to be occupied by the four Thurston/Pierce subspecies of Mazama pocket gopher;

(4) Unauthorized utilization of trapping or poisoning techniques in areas occupied by the four Thurston/Pierce subspecies of Mazama pocket gopher;

(5) Intentional harassment or removal of pocket gophers; and

(6) When conducted over large areas, removal of forage habitat by burning or other means i.e., the area of removal is so large that gophers can't access foraging habitat from the center of the area.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the Washington Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). Requests for copies of the regulations concerning listed animals and general inquiries regarding prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Ecological Services, Eastside Federal Complex, 911 NE. 11th Avenue, Portland, OR 97232–4181 (telephone 503–231–6158; facsimile 503–231–6243).

If the four Thurston/Pierce subspecies of Mazama pocket gopher are listed under the Act, the State of Washington may enter into agreements with Federal agencies to administer and manage any area required for the conservation, management, enhancement, or protection of endangered species. Funds for these activities could be made available under section 6 of the Act (Cooperation with the States) or through competitive application to receive funding through our Recovery Program under section 4 of the Act. Thus, the Federal protection afforded to the subspecies by listing them as threatened species will be reinforced and supplemented by protection under State law.

Special Rules

Under section 4(d) of the Act, the Secretary may publish a special rule that modifies the standard protections for threatened species in the Service's regulations at 50 CFR 17.31, which implement section 9 of the Act, with special measures that are determined to be necessary and advisable to provide for the conservation of the subspecies. As a means to promote conservation efforts on behalf of the four Thurston/Pierce subspecies of Mazama pocket gopher, we are proposing special rules for these subspecies under section 4(d) of the Act. In the case of a special rule,

the general regulations (50 CFR 17.31 and 17.71) applying most prohibitions under section 9 of the Act to threatened species do not apply to that species, and the special rule contains the prohibitions necessary and appropriate to conserve that species.

Under the proposed special rule, take of these subspecies caused by restoration- and/or maintenance-type activities by airports on State, county, private, or Tribal lands and ongoing single-family residential noncommercial activities would be exempt from section 9 of the Act. These activities include mechanical weed and grass removal on airports. We also propose to exempt certain construction activities that occur in already-developed sites within single-family residential development footprints. These include the placement of above-ground fencing, garden plots, children's play equipment, residential dog kennels, and storage sheds and carports on block or above-ground footings. In addition, we also propose to exempt certain normal farming or ranching activities, including: grazing, routine fence and structure maintenance, mowing, herbicide use, burning, and other routine activities as described under proposed § 17.40 (Special Rules—Mammals) at the end of this document. The rule targets these activities to encourage landowners to continue to maintain those areas that are not only important for airport safety, agricultural use, and restoration activities, but also provide habitat for the four Thurston/Pierce subspecies of Mazama pocket gopher. On Federal lands, airport restoration and maintenance type activities will be addressed through the section 7 process.

Justification

Airport Management. Some management actions taken at airports are generally beneficial to Mazama pocket gophers. The Service believes current management of these areas provide for safe aircraft operations while simultaneously providing for the conservation of pocket gophers. Under the proposed rule, covered actions would include vegetation management to maintain desired grass height on or adjacent to airports through mowing or herbicide use; hazing of hazardous wildlife, routine management, repair and maintenance of roads and runways; and management of forage, water, and shelter to be less attractive to these hazardous wildlife. See proposed § 17.40 (Special Rules—Mammals) for specific language.

If finalized, the listing of the four Thurston/Pierce subspecies of Mazama pocket gopher would impose a requirement of airport managers where the subspecies occur to consider the effects of their management activities on these subspecies. Additionally, airport managers would likely take actions to deter the subspecies from inhabiting areas where they currently occur in order to avoid the burden of the resulting take restrictions that would accrue from the presence of a listed species. However, a special rule under section 4(d) of the Act for airports which exempts activities, such as mowing or other management to deter hazardous wildlife, that result in take under section 9 of the Act, would encourage airports to maintain habitat for the four Thurston/Pierce subspecies of Mazama pocket gopher.

Agricultural Lands. Agricultural lands provide important habitats for the four Thurston/Pierce subspecies of Mazama pocket gopher. Examples of farmed areas that are occupied by Mazama pocket gophers and provide suitable habitat include livestock ranches, pastures, seed nurseries, and open areas where vegetation is maintained in an early seral condition. Some farming activities like tilling or discing, if conducted during certain times of the year, can result in individuals being injured or killed. But where adjacent local populations remain intact, Mazama pocket gophers may recolonize disturbed areas and continue to persist in areas that are farmed, grazed, and used for agricultural production. Because agricultural areas provide important habitats for the four Thurston/Pierce subspecies of Mazama pocket gopher, we propose to exempt normal farming and ranching activities, including: grazing, routine fence and structure maintenance, mowing, herbicide use, burning, and other routine activities as described under proposed § 17.40 (Special Rules—Mammals), which may result in take of the Mazama pocket gopher under section 9 of the Act.

Ongoing Small Landowner Noncommercial Activities. The four Thurston/Pierce subspecies of Mazama pocket gopher occur on private lands throughout Thurston and Pierce Counties. Activities by single-family residential landowners in these areas have the potential to harm or kill pocket gophers. Section 9 of the Act provides general prohibitions on activities that would result in take of a threatened species; however, the Service recognizes that routine maintenance and some small construction activities, even those with the potential to inadvertently take individual Mazama pocket gophers, may provide for the long-term conservation needs of the species. The Service recognizes that in the long term, it is a benefit to the four Thurston/Pierce subspecies of Mazama pocket gopher to maintain the distribution of the species across private and public lands to aid in the recovery of the species. We believe this special rule will further conservation of the species by discouraging conversions of the landscape into habitats unsuitable for the four Thurston/Pierce subspecies of Mazama pocket gopher and encouraging landowners to continue managing the remaining landscape in ways that meet the needs of their operation and provide suitable habitat for these four subspecies. Under the proposed rule, covered actions would include vegetative management through mowing or herbicide use, and the construction of dog kennels, fences, garden plots, playground equipment, and storage sheds and carports on block or above-ground footings, as described under proposed § 17.40 (Special Rules—Mammals).

Provisions of the Proposed Special Rule

We believe these actions and activities, while they may have some minimal level of harm or disturbance to the four Thurston/Pierce subspecies of Mazama pocket gopher, are not expected to adversely affect the species' conservation and recovery efforts.

This proposal will not be finalized until we have reviewed comments from the public and peer reviewers. Exempted activities include existing routine airport practices as outlined above by non-Federal entities on existing airports, agricultural and ranching activities, and routine single-family residential activities.

Critical Habitat Designation for the Four Thurston/Pierce Subspecies of Mazama Pocket Gopher

It is our intent to discuss below only those topics directly relevant to the designation of critical habitat for the four Thurston/Pierce subspecies of Mazama pocket gopher (Olympia, Roy Prairie, Tenino, and Yelm) in this section of the proposed rule.

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner seeks or requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographic area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical and biological features within an area, we focus on the principal biological or physical constituent elements (primary constituent elements such as roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type) that are essential to the conservation of the species. Primary constituent elements are the elements of physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographic area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. For example, an area currently occupied by the species, but that was not occupied at the time of listing, may be determined to be essential to the conservation of the species and may be included in the critical habitat designation. We designate critical habitat in areas outside the geographic area occupied by a species only when a designation limited to its range would be inadequate to ensure the conservation of the species.

Methods

As required by Section 4 of the Act, we used the best scientific data available in determining those areas that contain the physical or biological features essential to the conservation of these species. Further, our Policy on Information Standards under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species (if available), articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, other unpublished materials, or experts' opinions or personal knowledge. In this case we used existing occurrence data for each species and identified the habitat and ecosystems upon which they depend. These sources of information included, but were not limited to:

1. Data used to prepare the proposed rule to list the species;
2. Information from biological surveys;
3. Peer-reviewed articles, various agency reports, and databases;
4. Information from the U.S. Department of Defense—Joint Base Lewis McChord and other cooperators;
5. Information from species experts;
6. Data and information presented in academic research theses; and
7. Regional Geographic Information System (GIS) data (such as species occurrence data, land use, topography, aerial imagery, soil data, and land ownership maps) for area calculations and mapping.

Habitat is dynamic, and species may move from one area to another over time. Climate change will be a particular challenge for biodiversity because the interaction of additional threats associated with climate change and current threats may push species beyond their ability to survive (Lovejoy 2005, pp. 325–326). The synergistic implications of climate change and habitat fragmentation are the most threatening facet of climate change for biodiversity (Hannah *et al.* 2005, p. 4). Current climate change predictions for terrestrial areas in the Northern Hemisphere indicate warmer air temperatures, more intense precipitation events, and increased summer continental drying (Field *et al.* 1999, pp. 1–3; Hayhoe *et al.* 2004, p. 12422; Cayan *et al.* 2005, p. 6; Intergovernmental Panel on Climate Change (IPCC) 2007, p. 1181). Climate change may lead to increased frequency and duration of severe storms and droughts (Golladay *et al.* 2004, p. 504; McLaughlin *et al.* 2002, p. 6074; Cook *et al.* 2004, p. 1015).

The information currently available on the effects of global climate change and increasing temperatures does not make sufficiently precise estimates of the location and magnitude of the

effects. Nor are we currently aware of any climate change information specific to the habitat of the species that would indicate what areas may become important to the subspecies in the future. Therefore, we are unable to determine what additional areas, if any, may be appropriate to include in the final critical habitat for these subspecies to address the effects of climate change.

We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the subspecies. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the subspecies. Areas that are important to the conservation of the subspecies, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) the prohibitions of section 9 of the Act if actions occurring in these areas may affect the subspecies. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time the species is determined to be endangered or threatened. Our regulations at 50 CFR 424.12(a)(1) state that the designation of critical habitat is not prudent when one or both of the following situations exist: (1) The species is threatened by taking or other activity and the identification of critical habitat can be expected to increase the degree of threat to the species; or (2) such designation of critical habitat would not be beneficial to the species.

Species Proposed for Listing

As we have discussed under the threats analysis for Factor B, there is no documentation that the four Thurston/Pierce subspecies of Mazama pocket gopher are currently significantly threatened by collection for private or commercial purposes.

We reviewed the information available for the four Thurston/Pierce subspecies of Mazama pocket gopher pertaining to their biological needs and habitat characteristics. In the absence of finding that the designation of critical habitat would increase threats to a species, if there are any benefits to a critical habitat designation, then a prudent finding is warranted. The potential benefits of critical habitat to the four Thurston/Pierce subspecies of Mazama pocket gopher include: (1) Triggering consultation under section 7 of the Act in new areas, for actions in which there may be a Federal nexus where it would not otherwise occur because, for example, it is or has become unoccupied or the occupancy is in question; (2) focusing conservation activities on the most essential features and areas; (3) providing educational benefits to State or county governments or private entities; and (4) preventing people from causing inadvertent harm to the subspecies.

The primary regulatory effect of critical habitat is the section 7(a)(2) requirement that Federal agencies refrain from taking any action that destroys or adversely modifies critical habitat. We find that the designation of critical habitat for the four Thurston/Pierce subspecies of Mazama pocket gopher will benefit them by serving to focus conservation efforts on the restoration and maintenance of ecosystem functions that are essential for attaining their recovery and long-term viability. In addition, the designation of critical habitat serves to inform management and conservation decisions by identifying any additional physical or biological features of the ecosystem that may be essential for the conservation of these subspecies. Therefore, because we have determined that the designation of critical habitat will not likely increase the degree of threat to the species and may provide some measure of benefit, we find that designation of critical habitat is prudent for the four Thurston/Pierce subspecies of Mazama pocket gopher.

Critical Habitat Determinability

Having determined that designation is prudent, under section 4(a)(3) of the Act we must find whether critical habitat for the four Thurston/Pierce subspecies of Mazama pocket gopher is determinable. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(i) Information sufficient to perform required analyses of the impacts of the designation is lacking, or

(ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

When critical habitat is not determinable, the Act allows the Service an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

We reviewed the available information pertaining to the biological needs of the four Thurston/Pierce subspecies of Mazama pocket gopher and habitat characteristics where these subspecies are located. This and other information represent the best scientific data available and led us to conclude that the designation of critical habitat is determinable for the four Thurston/Pierce subspecies of Mazama pocket gopher.

Physical or Biological Features

In accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, in determining which areas within the geographical area occupied by the species at the time of listing to designate as critical habitat, we identify the physical or biological features that are essential to the conservation of the species and which may require special management considerations or protection. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of a species.

We derive the specific physical or biological features required for each subspecies from studies of their habitat, ecology, and life history as described above in this document. We have determined that the physical and

biological features described below are essential for the conservation of the four Thurston/Pierce subspecies of Mazama pocket gopher, and have further determined that these features may require special management considerations or protection.

We have determined that the following physical or biological features are essential for the four Thurston/Pierce subspecies of Mazama pocket gopher:

Space for Individual and Population Growth and for Normal Behavior

Pocket gophers have low vagility, meaning they have a poor dispersal capability (Williams and Baker 1976, p. 303). *Thomomys mazama* pocket gophers are smaller in size than other sympatric (occurring within the same geographic area; overlapping in distribution) or parapatric (immediately adjacent to each other but not significantly overlapping in distribution) *Thomomys* species (Verts and Carraway 2000, p. 1). Both dispersal distances and home range size are therefore likely to be smaller than for other *Thomomys* species. Dispersal distances may vary based on surface or soil conditions and size of the animal. For other, larger, *Thomomys* species, dispersal distances average about 131 ft (40 m) (Barnes 1973, pp. 168–169; Williams and Baker 1976, p. 306; Daly and Patton 1990, pp. 1286, 1288). Initial results from dispersal research being conducted on JBLM indicates that Mazama pocket gophers in Washington usually disperse from 13.1–32.8 ft (4–10 m), though one animal moved 525 ft (160m) in 1 day (Olson 2012b, p. 5). Suitable dispersal habitat contains gopher foraging habitat and is free of barriers to gopher movement. Barriers include, but are not limited to, open water, steep slopes, and soils or substrates inappropriate for burrowing.

The home range of a Mazama pocket gopher is composed of suitable breeding and foraging habitat (described below, under ''Food, water, air, light, minerals, or other nutritional or physiological requirements''). Home range size varies based on factors such as soil type, climate, and density and type of vegetative cover (Cox and Hunt 1992, p. 133; Case and Jasch 1994, p. B–21; Hafner *et al.* 1998, p. 279). Home range size for individual Mazama pocket gophers averages about 1,076 square feet (ft^2) (100 square meters (m^2)) (Witmer *et al.* 1996, p. 96). Based on work done by Converse *et al.* (2010, pp. 14–15), a local population could be self-sustaining if it occurred on a habitat patch that was equal to or greater than 50 ac (20 ha) in size.

Therefore, based on the information above, we identify patches of breeding and foraging habitat that are equal to or greater than 50 ac (20 ha) in size or within dispersal distance of each other, as well as corridors of suitable dispersal habitat, as physical or biological features essential to the conservation of the four Thurston/Pierce subspecies of Mazama pocket gopher.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements and Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

The four Thurston/Pierce subspecies are associated with glacial outwash prairies in western Washington, an ecosystem of conservation concern (Hartway and Steinberg 1997, p. 1). Steinberg and Heller (1997, p. 46) found that Mazama pocket gophers are even more patchily distributed than are the prairie habitats they inhabit. That is, there are some seemingly high quality prairies within the species' range that lack pocket gophers. Prairie habitats have a naturally patchy distribution, and within them, there is a patchy distribution of soil rockiness (Steinberg and Heller 1997, p. 45; WDFW 2009a), which may further restrict the total area that gophers can utilize since they avoid areas of excessive rockiness.

Of the glacial outwash prairie soils or prairie-like soils present in western Washington, the four Thurston/Pierce subspecies of Mazama pocket gopher are most often found in deep, well-drained, friable soils capable of supporting the forbs, bulbs, and grasses that are the preferred forage for gophers (Stinson 2005, pp. 22–23).

In order to support typical Mazama pocket gopher forage plants, areas supporting Mazama pocket gophers tend to be largely free of shrubs and trees. Woody plants shade out the forbs, bulbs, and grasses that gophers prefer to eat, and high densities of woody plants make travel both below and above the ground difficult for gophers. The probability of Mazama pocket gopher occupancy is much higher in areas with less than 10 percent woody vegetation cover (Olson 2011, p. 16).

Although some soils used by Mazama pocket gophers are relatively sandy, gravelly, or silty, those most frequently associated with the subspecies are loamy and deep, have slopes generally less than 15 percent, and have good drainage or permeability. These soils types additionally provide the essential physical and biological features of cover or shelter, as well as sites for breeding, reproduction, or rearing of offspring. Soils series where individuals of the four Thurston/Pierce subspecies of Mazama pocket gopher may be found include Alderwood, Cagey, Everett, Godfrey, Indianola, Kapowsin, McKenna, Nisqually, Norma, Spana, Spanaway, Spanaway-Nisqually complex, and Yelm.

Additionally, encroachment of woody vegetation into the habitat of the four Thurston/Pierce subspecies of Mazama pocket gopher continues to further reduce the size of the remaining prairies and prairie-type areas, thus reducing the amount of habitat available for gophers to burrow, forage, and reproduce. Historically these areas would have been maintained by natural or human-caused fires. Fire suppression allows Douglas-fir and other woody plants to encroach on and overwhelm prairie habitat (Stinson 2005, p. 7). Mazama pocket gophers require areas where natural disturbance or management prevents the encroachment of woody vegetation into their preferred prairie or meadow habitats.

Therefore, based on the information above, we identify soils series that are known to support the Mazama pocket gopher in Washington (listed above), and vegetative habitat with less than 10 percent woody plant cover, that provides for feeding, breeding, and foraging, as physical or biological features essential to the conservation of the Mazama pocket gopher.

Habitats That Are Protected From Disturbance or Are Representative of the Historical, Geographical, and Ecological Distributions of a Species

Predation, specifically feral and domestic cat and dog predation, is a threat to the four Thurston/Pierce subspecies of Mazama pocket gopher. Urbanization exacerbates this threat with the addition of feral and domestic cats and dogs into the matrix of pocket gopher habitat. Many pets are not controlled by their owners in the semi-urban and rural environments that the four Thurston/Pierce subspecies of Mazama pocket gopher currently inhabit, leading to uninhibited predation of native animals. Where local populations of native wild animals are small or declining, predation can drive populations farther toward extinction (Woodworth 1999, pp. 74–75). Many local populations of the four Thurston/Pierce subspecies of Mazama pocket gopher are small and occur in a matrix of residential and agricultural development, with many feral and domestic pets in the vicinity. Pocket gophers need areas free of the threat of predation by feral and domestic cats and dogs.

In Washington it is currently illegal to trap or poison Mazama pocket gophers (WAC 232–12–011, RCW 77.15.194), but not all property owners are aware of these laws, nor are most citizens capable of differentiating between mole and pocket gopher soil disturbance. In light of this, it is reasonable to believe that mole trapping and poisoning efforts have the potential to adversely affect pocket gopher populations within the range of the four Thurston/Pierce subspecies of Mazama pocket gopher. Mazama pocket gophers require areas free of human disturbance from trapping and poisoning.

Therefore, based on the information above, we identify areas where gophers are protected from predation by feral or domestic animals, as well as from human disturbance in the form of trapping and poisoning, as physical or biological features essential to the conservation of the Mazama pocket gopher.

Primary Constituent Elements for the Four Thurston/Pierce Subspecies of Mazama Pocket Gopher

Under the Act and its implementing regulations, we are required to identify the physical or biological features essential to the conservation of the four Thurston/Pierce subspecies of Mazama pocket gopher in areas occupied at the time of listing, focusing on the features' primary constituent elements (PCEs). We consider primary constituent elements to be the elements of physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species.

Based on our current knowledge of the physical or biological features and habitat characteristics required to sustain the subspecies' life-history processes, we determine that the primary constituent elements specific to the four Thurston/Pierce subspecies of Mazama pocket gopher are:

(i) Friable, loamy, and deep soils, some with relatively greater content of sand, gravel, or silt, all generally on slopes less than 15 percent in the following series:

(a) Alderwood;
(b) Cagey;
(c) Everett;
(d) Godfrey
(e) Indianola;
(f) Kapowsin;
(g) McKenna;
(h) Nisqually;
(i) Norma;
(j) Spana;
(k) Spanaway;
(l) Spanaway-Nisqually complex; and
(m) Yelm.

(ii) Areas equal to or larger than 50 ac (20 ha) in size that provide for breeding, foraging, and dispersal activities, found in the soil series listed in (i) that have:

(a) Less than 10 percent woody vegetation cover.

(b) Vegetative cover suitable for foraging by gophers. Pocket gophers' diet includes a wide variety of plant material, including leafy vegetation, succulent roots, shoots, tubers, and grasses. Forbs and grasses that Mazama pocket gophers are known to eat include, but are not limited to: *Achillea millefolium* (common yarrow), *Agoseris* spp. (agoseris), *Cirsium* spp. (thistle), *Bromus* spp. (brome), *Camassia* spp. (camas), *Collomia linearis* (tiny trumpet), *Epilobium spp.* (several willowherb spp.), *Eriophyllum lanatum* (woolly sunflower), *Gayophytum diffusum* (groundsmoke), *Hypochaeris radicata* (hairy cat's ear), *Lathyrus* spp. (peavine), *Lupinus* spp. (lupine), *Microsteris gracilis* (slender phlox), *Penstemon* spp. (penstemon), *Perideridia gairdneri* (Gairdner's yampah), *Phacelia heterophylla* (varileaf phacelia), *Polygonum douglasii* (knotweed), *Potentilla* spp. (cinquefoil), *Pteridium aquilinum* (bracken fern), *Taraxacum officinale* (common dandelion), *Trifolium* spp. (clover), and *Viola* spp. (violet).

(c) Few, if any barriers to dispersal. Barriers to dispersal include, but are not limited to: open water; steep slopes (greater than 35 percent); wide expanses of rhizomatous grasses; concrete; large areas of rock; development and buildings; and soils or substrates inappropriate for burrowing.

With this proposed designation of critical habitat, we intend to identify the physical or biological features essential to the conservation of the species, through the identification of the primary constituent elements sufficient to support the life-history processes of the species. All units and subunits proposed to be designated as critical habitat are currently occupied by one or more of the four Thurston/Pierce subspecies of Mazama pocket gopher and contain all of the primary constituent elements essential to the conservation of the species.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features which are essential to the conservation of the species and which may require special management considerations or protection. Here we describe the type of special management considerations or protections that may be required for the physical or biological features identified as essential for Mazama pocket gophers. The specific critical habitat subunits where these management considerations or protections apply are identified in Table 1.

All areas designated as critical habitat will require some level of management to address the current and future threats to the four Thurston/Pierce subspecies of Mazama pocket gopher and to maintain or restore the PCEs. A detailed discussion of activities influencing the four Thurston/Pierce subspecies of Mazama pocket gopher and their habitats can be found in the preceding proposed listing rule. Threats to the physical or biological features that are essential to the conservation of these subspecies and that may warrant special management considerations or protection include, but are not limited to: (1) Loss of habitat from conversion to other uses; (2) control of nonnative, invasive species; (3) development; (4) construction and maintenance of roads and utility corridors; (5) predation by feral or domestic animals; (6) disease; and (7) habitat modifications brought on by succession of vegetation due to lack of disturbance, both small- and large-scale. These threats also have the potential to affect the PCEs if they are conducted within or adjacent to designated units.

The physical or biological features essential to the conservation of the four Thurston/Pierce subspecies of Mazama pocket gopher may require special management considerations or protection to control or prevent the establishment of invasive woody plants, which create shade and utilize light, food and nutrients otherwise utilized by the forb, bulb, and grass species that the gophers require for forage. Management may be implemented using hand tools or mechanical methods, prescribed fire, and the judicious use of herbicides. Although several management techniques are being implemented on public lands, we may need to improve our outreach to educate private landowners on controlling their pets and appropriately managing grazing on their properties, as well as to developing incentives for landowners who agree to conserve habitat. Incentives would create protected areas, through agreements or acquisitions. These would include corridors between existing protected habitat areas that may require restoration, enhancement actions, and long-term maintenance.

TABLE 1—THREATS TO THE FOUR THURSTON/PIERCE SUBSPECIES OF MAZAMA POCKET GOPHER IDENTIFIED IN SPECIFIC PROPOSED CRITICAL HABITAT SUBUNITS; THREATS SPECIFIC TO THE PHYSICAL OR BIOLOGICAL FEATURES, WHICH MAY REQUIRE SPECIAL MANAGEMENT CONSIDERATIONS OR PROTECTION AS DESCRIBED IN THE TEXT, ARE IDENTIFIED WITH AN ASTERISK

Threat factors under the Endangered Species Act	Subunits of proposed designated critical habitat for the Mazama pocket gopher subspecies
Factor A:	
Development *	Unit 1: all subunits.
Loss of natural disturbance processes, invasive species, and succession *	Unit 1: all subunits.
Military training *	Unit 1: 1–A, 1–B, 1–E.
Factor B:	
Overutilization for commercial, recreational, scientific, or educational purposes	NA.
Factor C:	
Disease	NA.
Predation	Unit 1: all subunits.
Factor D:	
The inadequacy of existing regulatory mechanisms *	Unit 1: all subunits.
Factor E:	
Low genetic diversity, small or isolated populations, and low reproductive success	NA.
Stochastic weather events	NA.
Climate change	NA.
Pesticides and herbicides	Unit 1: 1–D, 1–E, 1–G, and 1–H.
Control as a pest species *	Unit 1: 1–D, 1–E, 1–G, and 1–H.
Recreation	NA.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(1)(A) of the Act, we use the best scientific and commercial data available to designate critical habitat. We review available information pertaining to the habitat requirements of the species, and begin by assessing the specific geographic areas occupied by the species at the time of listing. If such areas are not sufficient to provide for the conservation of the species, in accordance with the Act and its implementing regulation at 50 CFR 424.12(e), we then consider whether designating additional areas outside the geographic areas occupied at the time of listing may be essential to ensure the conservation of the species. We consider unoccupied areas for critical habitat when a designation limited to the present range of the species may be inadequate to ensure the conservation of the species. In this case, since we are proposing listing simultaneously with the proposed critical habitat, all areas presently occupied by each of the subspecies are presumed to constitute those areas occupied at the time of listing; those areas currently occupied by the subspecies are identified as such in each of the unit or subunit descriptions below. None of the subunits are believed to be unoccupied at the time of listing. Our determination of the areas occupied at the time of listing, is provided below.

We plotted the known locations of the four Thurston/Pierce subspecies of Mazama pocket gopher where they occur in the south Puget Sound lowlands using 2011 NAIP digital imagery in ArcGIS, version 10 (Environmental Systems Research Institute, Inc.), a computer geographic information system program.

To determine if the currently occupied areas contain the primary constituent elements, we assessed the life history components and the distribution of the subspecies through element occurrence records in State natural heritage databases and natural history information on each of the subspecies as they relate to habitat. To determine if any unoccupied sites met the criteria for critical habitat, we considered: (1) The importance of the site to the overall status of the subspecies to prevent extinction and contribute to future recovery of the subspecies; (2) whether the area presently provides the essential physical or biological features, or could be managed and restored to contain the necessary physical and biological features to support the subspecies; and (3) whether individuals were likely to colonize the site.

Occupied Areas

For the four Thurston/Pierce subspecies of Mazama pocket gopher, we are proposing to designate critical habitat only in areas within the geographical area occupied by the four subspecies at the time of listing. All units proposed for critical habitat for the four Thurston/Pierce subspecies of Mazama pocket gopher are currently occupied as determined by recent surveys, within the last five years (JBLM 2012, Krippner 2011, pp. 25–29; Olson 2012, pp. 9–10; WDFW 2012), and all provide one or more of the physical or biological features that may require special management considerations or protection, as described in the unit and subunit descriptions that follow.

In all cases, when determining proposed critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement (such as airport runways and roads), and other structures because such lands lack the essential physical or biological features for the four Thurston/Pierce subspecies of Mazama pocket gopher. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

We are proposing one critical habitat unit for designation based on sufficient elements of physical and biological features being present to support the

four Thurston/Pierce subspecies of Mazama pocket gopher. These unit is further divided into 8 subunits. All of the subunits contain the identified elements of physical and biological features necessary to support the subspecies' use of that habitat.

We invite public comment on our identification of those areas presently occupied by the subspecies that provide the physical or biological features that may require special management considerations or protection.

Proposed Critical Habitat Designation

We are proposing critical habitat for the four Thurston/Pierce subspecies of Mazama pocket gopher in the State of Washington, as follows: The South Sound Unit (Unit 1), which includes eight subunits.

Four Thurston/Pierce Subspecies of Mazama Pocket Gopher—Unit 1

We are proposing for designation of critical habitat lands that we have determined are occupied at the time of listing and contain sufficient elements of physical or biological features to support life-history processes essential for the conservation of the Olympia, Roy Prairie, Tenino, and Yelm subspecies of Mazama pocket gopher.

We are proposing critical habitat for the four Thurston/Pierce subspecies of Mazama pocket gopher in one unit: the South Sound Unit, totaling 9,234 ac (3,737 ha). This includes 6,345 ac (2,567 ha) of Federal ownership; 820 ac (331 ha) of State ownership; 1,934 ac (783 ha) of private ownership; and 135 ac (55 ha) of lands owned by a Port, local municipality, or nonprofit conservation organization. The South Sound Unit for the four Thurston/Pierce subspecies of Mazama pocket gopher contains eight subunits, all of which are presently occupied by one or more of the four Thurston/Pierce subspecies. All subunits contain one or more of the PCEs to support essential life-history processes for these subspecies. The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for the Olympia, Roy Prairie, Tenino, and Yelm pocket gophers. The eight subunits we propose as critical habitat are: (1) (1–A) 91st Division Prairie; (2) (1–B) Marion Prairie; (3) (1–C) Olympia Airport; (4) (1–D) Rocky Prairie; (5) (1–E) Tenalquot Prairie; (6) (1–F) West Rocky Prairie; (7) (1–G) Scatter Creek; and (8) (1–H) Rock Prairie. The approximate area and landownership for each proposed critical habitat unit and subunit is shown in Table 2.

TABLE 2—PROPOSED CRITICAL HABITAT UNITS FOR THE FOUR THURSTON/PIERCE SUBSPECIES OF MAZAMA POCKET GOPHER

[**Note:** Area sizes may not sum due to rounding. Area estimates reflect all land within critical habitat unit boundaries]

Unit 1 South Sound	Subunit name	Federal	State	Private	Other*
		Ac (Ha)	Ac (Ha)	Ac (Ha)	Ac (Ha)
1–A	91st Division Prairie	4,120 (1,667)	0	0	0
1–B	Marion Prairie	720 (291)	0	0	0
1–C	Olympia Airport	0	0	0	676 (274)
1–D	Rocky Prairie	0	54 (22)	385 (156)	0
1–E	Tenalquot Prairie	1,505 (609)	0	154 (62)	135 (55)
1–F	West Rocky Prairie	0	134 (54)	0	0
1–G	Scatter Creek	0	632 (256)	98 (40)	0
1–H	Rock Prairie	0	0	621 (251)	0
	Unit 1 Totals	6,345 (2,567)	820 (331)	1,258 (509)	811 (329)

*Other = Local municipalities and nonprofit conservation organization.

Here we present brief descriptions of all subunits, and reasons why they meet the definition of critical habitat for the four Thurston/Pierce subspecies of Mazama pocket gopher, below.

Unit 1: South Sound Unit—Four Thurston/Pierce Subspecies of Mazama Pocket Gopher

The South Sound Unit and its constituent subunits are all currently occupied by one or more Mazama pocket gophers of the subspecies *Thomomys mazama glacialis* (Roy Prairie pocket gopher), *pugetensis* (Olympia pocket gopher), *tumuli* (Tenino pocket gopher), or *yelmensis* (Yelm pocket gopher) (the four Thurston/Pierce subspecies). All subunits contain the physical or biological features essential to the conservation of these subspecies, which may require special management considerations or protection. All subunits are subject to the same suite of threats, aside from one suite of threats unique to DOD lands (subunits 1–A, 1–B, and the Federal portions of subunit 1–E). The common threats to the essential features include: development on or adjacent to the subunits, incompatible management practices, invasive species, and the inadequacy of existing regulatory mechanisms. The threat unique to DOD lands is military training. In all subunits, the physical or biological features essential to the conservation of each subspecies may require special management considerations or protection to restore, protect, and maintain the essential features found in the subunits. For those threats that are common to all subunits, special management considerations or protection may be required to address direct or indirect habitat loss due to development, invasive plant species, or use of trapping or poisoning techniques by landowners or land managers of the subunits themselves or adjacent landowners or land managers. For those threats that are unique to DOD lands, special management considerations or protection may be required to address uncontrolled fires due to deployment of explosive or incendiary devices, military training involving heavy equipment (resulting in trampling or crushing of burrows), digging or trenching, bombardment, or use of live ammunition.

Subunit 1–A: 91st Division Prairie. This subunit consists of 4,120 ac (1,667 ha) and is made up entirely of lands on the JBLM, owned by the DOD. This subunit is located west-northwest of the city of Roy, Pierce County, Washington. Subunit 1–A is occupied by the Roy Prairie pocket gopher and the Yelm pocket gopher and contains the physical or biological features essential to the conservation of these subspecies due to

the underlying soils series (Nisqually and Spanaway), suitable forb and grass vegetation present on-site, and its large size. The physical or biological features essential to the conservation of the Roy Prairie pocket gopher and the Yelm pocket gopher may require special management considerations or protection to address threats listed above that are common to all subunits and from uncontrolled fires due to deployment of explosive or incendiary devices, military training involving heavy equipment (resulting in trampling or crushing of burrows), digging or trenching, bombardment, or use of live ammunition. This critical habitat subunit (1–A) is being considered for exemption from designation of critical habitat under section 4(a)(3)(B)(i) of the Act, contingent on our approval of the DOD INRMP for JBLM (see Exemptions).

Subunit 1–B: Marion Prairie. This subunit consists of 720 ac (291 ha) and contains JBLM lands owned by the DOD. This subunit is located west of the city of Roy, Pierce County, Washington. Subunit 1–B is occupied by the Roy Prairie pocket gopher and the Yelm pocket gopher, and provides physical or biological features essential to the conservation of these subspecies due to the underlying soils series (Nisqually and Spanaway), suitable forb and grass vegetation present onsite, and its large size. The features essential to the conservation of the species may require special management considerations or protection to address uncontrolled fires due to deployment of explosive or incendiary devices, military training involving heavy equipment (resulting in trampling or crushing of burrows), digging or trenching, bombardment, or use of live ammunition. This critical habitat subunit (1–B) is being considered for exemption from designation of critical habitat under section 4(a)(3)(B)(i) of the Act, contingent on our approval of the DOD INRMP for JBLM (see Exemptions).

Subunit 1–C: Olympia Airport. This subunit consists of 676 ac (274 ha). This subunit is made up of lands owned by the Port of Olympia and is located south of the cities of Olympia and Tumwater, Thurston County, Washington. Subunit 1–C is occupied by the Olympia pocket gopher and the Yelm pocket gopher and contains the physical or biological features essential to the conservation of the subspecies due to the underlying soils series (Cagey, Everett, Indianola, and Nisqually), suitable forb and grass vegetation present onsite, and its large size.

Subunit 1–D: Rocky Prairie. This subunit consists of 439 ac (178 ha) and contains lands owned by one commercial landowner, Burlington Northern Santa Fe Railroad, and WDNR, which owns the Rocky Prairie NAP, a portion of the subunit. This subunit is located north of the city of Tenino, Thurston County, Washington. Subunit 1–D is occupied by the Tenino pocket gopher and the Yelm pocket gopher, and contains the physical or biological features essential to the conservation of the species due to the underlying soils series (Everett, Nisqually, Spanaway, and Spanaway-Nisqually complex), suitable forb and grass vegetation present onsite, and its large size. A portion of the State lands include the Rocky Prairie Natural Area Preserve which makes up 35 ac (14 ha) of this critical habitat subunit (1–D) and is being proposed for exclusion from designation of critical habitat under section 4(b)(2) of the Act, due to the approved WDNR State Lands HCP (see Exclusions)

Subunit 1–E: Tenalquot Prairie. This subunit consists of 1,794 ac (726 ha) and contains lands owned by one commercial landowner, The Nature Conservancy and DOD, which owns the largest portion of the subunit. This subunit is located northwest of the city of Rainier, Thurston County, Washington. Subunit 1–E is occupied by the Yelm pocket gopher and contains the physical or biological features essential to the conservation of the species due to the underlying soils series (Spanaway and Spanaway-Nisqually complex), suitable forb and grass vegetation present onsite, and its large size. On the 1,505 ac (609 ha) in this subunit that are owned by DOD, special management considerations or protection may be required to address threats from military training involving heavy equipment (resulting in trampling or crushing of burrows). The portion of this proposed critical habitat designation on JBLM (1,505 ac; 609 ha) is being considered for exemption from designation of critical habitat under section 4(a)(3)(B)(i) of the Act, contingent on our approval of the DOD INRMP for JBLM (see Exemptions).

Subunit 1–F: West Rocky Prairie. This subunit consists of 134 ac (54 ha) and contains lands within the West Rocky Prairie Wildlife Area, owned by WDFW, north of the city of Tenino, Thurston County, Washington. Subunit 1–F is occupied by the Olympia pocket gopher and contains the physical or biological features essential to the conservation of the species due to the underlying soils series (Nisqually, Norma, and Spanaway-Nisqually complex), suitable forb and grass vegetation present onsite, and its large size.

Subunit 1–G: Scatter Creek. This subunit consists of 730 ac (296 ha) and contains lands within the Scatter Creek Wildlife Area, owned by WDFW, and one private landowner near the city of Grand Mound, Thurston County, Washington. WDFW holds a lease on the private lands, which totals approximately 98 ac (40 ha), and manages the habitat the same as on adjacent WDFW lands (Hays 2012, *in litt.*). The lease expires in 2014. Subunit 1–G is occupied by the Yelm pocket gopher and contains the physical or biological features essential to the conservation of the species due to the underlying soils series (McKenna, Nisqually, Spanaway, and Spanaway-Nisqually complex), suitable forb and grass vegetation present on-site, and its large size. A powerline right-of-way managed by the BPA crosses Scatter Creek Wildlife Area and may require special management consideration. We are considering the exclusion of approximately 98 ac (40 ha) of private property in this subunit under section 4(b)(2) of the Act, due to the level of public benefits derived from encouraging collaborative efforts and encouraging private and local conservation efforts; and the effect designation would have on these partnerships as well as the existing WDFW lease on this property, and the fact that this property is managed in a manner consistent with the conservation of this species (see Exclusions).

Subunit 1–H: Rock Prairie. This subunit consists of 621 ac (251 ha) and contains lands owned by two private residential and commercial landowners. One of the private landowners' property (379 ac; 153 ha) is entirely covered by a Natural Resources Conservation Service (NRCS) Grassland Reserve Program agreement and partially covered under a permanent conservation easement. This subunit is located just west of the city of Tenino, Thurston County, Washington. Subunit 1–H is occupied by the Yelm pocket gopher and contains the physical or biological features essential to the conservation of the species due to the underlying soils series (Yelm, Spanaway, and Nisqually), suitable forb and grass vegetation present onsite, and its large size. The entire acreage of the proposed critical habitat on one private landowner's property is being considered for exclusion under section 4(b)(2) of the Act, due to the conservation easement on approximately 530 ac (215 ha) of their property and the Grassland Reserve Program plan developed in partnership

with NRCS for the long-term management of their property, which is consistent with restoration and management needs for sustaining prairies (see Exclusions).

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our regulatory definition of ''destruction or adverse modification'' (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F. 3d 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.,* 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service (under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local, or private lands that are not federally funded or authorized, do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, or are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies sometimes may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that alter the physical or biological features to an extent that appreciably reduces the conservation value of critical habitat for the four Thurston/Pierce subspecies of Mazama pocket gopher. As discussed above, the role of critical habitat is to support the life-history needs of the subspecies and provide for the conservation of the subspecies.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may affect the physical or biological features of critical habitat, or destroy or adversely modify critical habitat.

Under section 7(a)(2) of the Act, activities that may affect critical habitat for the four Thurston/Pierce subspecies of Mazama pocket gopher, when carried out, funded, or authorized by a Federal agency, require consultation. These activities may include, but are not limited to:

(1) Actions that restore, alter, or degrade habitat features through development, agricultural activities, burning, mowing, herbicide use or other means in suitable habitat for the four Thurston/Pierce subspecies of Mazama pocket gopher.

(2) Actions that would alter the physical or biological features of critical habitat including modification of soil profiles or the composition and structure of vegetation in suitable habitat for the four Thurston/Pierce subspecies of Mazama pocket gopher. Such activities could include, but are not limited to, construction, grading or other development, mowing, or conversion of habitat (military training on DOD lands, recreational use, off road vehicles on Federal, State, private, or Tribal lands). These activities may affect the physical or biological features of critical habitat for the four Thurston/Pierce subspecies of Mazama pocket gopher by crushing burrows, removing forage, or impacting habitat essential for completion of life history.

(3) Activities within or adjacent to critical habitat that affect or degrade the conservation value or function of the physical or biological features of critical

habitat for the four Thurston/Pierce subspecies of Mazama pocket gopher.

Exemptions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resource management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

(1) An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;

(2) A statement of goals and priorities;

(3) A detailed description of management actions to be implemented to provide for these ecological needs; and

(4) A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.''

We consult with the military on the development and implementation of INRMPs for installations with listed species. We analyzed INRMPs developed by military installations located within the range of the proposed critical habitat designation for the four Thurston/Pierce subspecies of Mazama pocket gopher to determine if they are exempt under section 4(a)(3) of the Act. The following areas are Department of Defense lands within the proposed critical habitat designation: (1) 91st Division Prairie, (2) Marion Prairie, and (3) Tenalquot Prairie. All of these areas are part of JBLM, except for the portion of Tenalquot Prairie known as the Morgan property.

Joint Base Lewis-McChord

Joint Base Lewis-McChord (formerly known as Fort Lewis and McChord Air Force Base) is an 86,000 ac (34,800 ha) military complex in western Washington. JBLM has an approved INRMP in place, dated July 2006, that covers the years 2006 through 2010. This INRMP is being updated and a revision will be submitted to the Service in 2012 (Steucke 2008, pers. comm.). JBLM is composed of both native and degraded grasslands; shrub-dominated vegetation; conifer, conifer-oak, oak-savannah, oak woodland and pine woodland/savannah forests; riverine, lacustrine, and palustrine wetlands; ponds and lakes; as well as other unique habitat, such as mima mounds. Portions of JBLM are currently occupied by the Mazama pocket gopher. Actions on this property include military training, recreation, transportation, utilities (including dedicated corridors), and land use.

The mission of JBLM is to maintain trained and ready forces for Army commanders worldwide, by providing them with training support and infrastructure. This includes a land base capable of supporting current and future training needs through good stewardship of the Installation's natural and cultural resources, as directed by Federal statutes, Department of Defense directives, directives and programs such as ACUB (Army Compatible Use Buffer Program), and Army and JBLM regulations.

Although only military actions are covered by the INRMP, several additional actions occurring on JBLM could pose substantial threats to the Mazama pocket gopher (e.g., dog trials, model airplanes, recreational activities), and are restricted to a few grassland properties. Many of the avoidance measures for military training action subgroups are implemented through environmental review and permitting programs related to a specific action. Timing of actions and education of users are important avoidance measures for the other activities.

Joint Base Lewis-McChord actively manages prairie habitat as part of Fort Lewis' INRMP (U.S. Army 2006). The purpose of the plan is to ''provide guidance for effective and efficient management of the prairie landscape to meet military training and ecological conservation goals.'' There are three overall goals including: (1) No net loss of open landscapes for military training; (2) no net reduction in the quantity or quality of moderate- and high-quality grassland; and (3) viable populations of all prairie-dependent and prairie-associated species.

Joint Base Lewis-McChord has a stewardship responsibility that includes actions to help recover threatened and endangered species under the Act. It is Army policy to consider candidate species when making decisions that may affect them, to avoid taking actions that may cause them to be listed, and to take affirmative actions that can preclude the need to list (AR 200–3).

Mazama pocket gophers exist on prairies on JBLM lands where vehicular traffic is currently restricted to established roads, but there are no specific restrictions on military training to protect Mazama pocket gophers. Efforts to maintain and increase populations on the installation focus on restoring or managing the overall condition of prairie habitat.

Two regional programs managed under the INRMP and funded by the DOD are currently underway on many of the lands where Mazama pocket gophers occur. The Fort Lewis ACUB program is a proactive effort to prevent ''encroachment'' at military installations. Encroachment includes current or potential future restrictions on military training associated with currently listed and candidate species under the Act. The Fort Lewis ACUB program focuses on management of non-Federal conservation lands in the vicinity of Fort Lewis that contain, or can be restored to, native prairie. Some of the ACUB efforts include improving habitats on JBLM property for prairie-dependent species, including the Mazama pocket gopher. It is implemented by means of a cooperative agreement between the Army and The Nature Conservancy (now Center for Natural Lands Management), and includes WDFW and WDNR as partners. To date, a total of $8.23 million has been allocated to this program (Anderson 2012, pers. comm). This funds conservation actions such as invasive plant control on occupied sites and the restoration of unoccupied habitat.

The JBLM Legacy program is dedicated to ''protecting, enhancing, and conserving natural and cultural resources on DOD lands through stewardship, leadership, and partnership.'' The Legacy program supports conservation actions that have regional or DOD-wide significance, and that support military training or fulfill legal obligations (DOD 2011, p. 2). In

recent years, substantial effort and funding have gone toward projects, both on and off JBLM, related to the Mazama pocket gopher.

Although JBLM's INRMP has the potential to provide a conservation benefit to the Mazama pocket gopher, it does not currently. Since their INRMP is currently undergoing revision and is subject to change, we are reserving judgment on whether management under the new INRMP will meet our criteria for exemption from critical habitat at this time. In accordance with section 4(a)(3)(B)(i) of the Act, if we determine prior to our final rulemaking that conservation efforts identified in the newly revised INRMP will provide a conservation benefit to the species identified previously, we may at that time exempt the identified lands from the final designation of critical habitat.

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face, as well as the legislative history are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise his discretion to exclude the area only if such exclusion would not result in the extinction of the species.

When identifying the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus; the educational benefits of mapping essential habitat for recovery of the listed species; and any benefits that may result from a designation due to State or Federal laws that may apply to critical habitat.

When identifying the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan that provides equal to or more conservation than a critical habitat designation would provide.

The Secretary can consider the existence of conservation agreements and other land management plans with Federal, private, State, and Tribal entities when making decisions under section 4(b)(2) of the Act. The Secretary may also consider relationships with landowners, voluntary partnerships, and conservation plans, and weigh the implementation and effectiveness of these against that of designation to determine which provides the greatest conservation value to the listed species. Consideration of relevant impacts of designation or exclusion under section 4(b)(2) may include, but is not limited to, any of the following factors:

(1) Whether the plan provides specific information on how it protects the species and the physical and biological features, and whether the plan is at a geographical scope commensurate with the species;

(2) Whether the plan is complete and will be effective at conserving and protecting the physical and biological features;

(3) Whether a reasonable expectation exists that conservation management strategies and actions will be implemented, that those responsible for implementing the plan are capable of achieving the objectives, that an implementation schedule exists, and that adequate funding exists;

(4) Whether the plan provides assurances that the conservation strategies and measures will be effective (i.e., identifies biological goals, has provisions for reporting progress, and is of a duration sufficient to implement the plan);

(5) Whether the plan has a monitoring program or adaptive management to ensure that the conservation measures are effective;

(6) The degree to which the record supports a conclusion that a critical habitat designation would impair the benefits of the plan;

(7) The extent of public participation;

(8) Demonstrated track record of implementation success;

(9) Level of public benefits derived from encouraging collaborative efforts and encouraging private and local conservation efforts; and

(10) The effect designation would have on partnerships.

After identifying the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to evaluate whether the benefits of exclusion outweigh those of inclusion. If our analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, we then determine whether exclusion would result in extinction. If exclusion of an area from critical habitat will result in extinction, we will not exclude it from the designation.

Based on the information provided by entities seeking exclusion, as well as any additional public comments received, we will evaluate whether certain lands in proposed critical habitat are appropriate for exclusion from the final designation under section 4(b)(2) of the Act. If the analysis indicates that the benefits of excluding lands from the final designation outweigh the benefits of designating those lands as critical habitat, then the Secretary may exercise his discretion to exclude the lands from the final designation.

Under section 4(b)(2) of the Act, we must consider all relevant impacts of the designation of critical habitat, including economic impacts. In addition to economic impacts (discussed in the Economics Analysis section, below), we consider a number of factors in a 4(b)(2) analysis. For example, we consider whether there are lands owned by the Department of Defense (DoD) where a national security impact might exist. We also consider whether Federal or private landowners or other public agencies have developed management plans or habitat conservation plans (HCPs) for the area or whether there are conservation partnerships or other conservation benefits that would be encouraged or discouraged by designation of, or exclusion from, critical habitat in an area. In addition, we look at the presence of Indian lands or Indian trust resources that might be affected, and consider the government-to-government relationship of the United States with Indian entities. We also consider any other relevant impacts that might occur because of the designation. To ensure that our final determination is based on the best available information, we are inviting comments on any foreseeable economic, national security, or other potential impacts resulting from this proposed designation of critical habitat from governmental, business, or private

interests and, in particular, any potential impacts on small businesses.

For the reasons discussed above, if the Secretary decides to exercise his discretion under section 4(b)(2) of the Act, we have identified certain areas that we are considering for exclusion from the final critical habitat designation for the four Thurston/Pierce subspecies of Mazama pocket gopher. However, we solicit comments on the inclusion or exclusion of such particular areas, as well as any other areas identified in the proposed rule (see Public Comments section). During the development of the final designation, we will consider economic impacts, public comments, and other new information. However, the Secretary's decision as to which, if any, areas may be excluded from the final designation is not limited to these lands. Additional particular areas, in addition to those identified below for potential exclusion in this proposed rule, may be excluded from the final critical habitat designation under section 4(b)(2) of the Act. In other words, potential exclusions are not limited to those areas specifically identified in this proposed rule.

However, we specifically solicit comments on the inclusion or exclusion of such areas. In the paragraphs below, we provide a detailed analysis of our exclusion of these lands under section 4(b)(2) of the Act.

Exclusions Based on Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we are preparing an analysis of the economic impacts of the proposed critical habitat designation and related factors. We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available for downloading from the Internet at *http://www.regulations.gov,* or by contacting the Washington Fish and Wildlife Office directly (see **FOR FURTHER INFORMATION CONTACT** section). During the development of a final designation, we will consider economic impacts, public comments, and other new information, and areas may be excluded from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

Exclusions Based on National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands owned or managed by the Department of Defense (DOD) where a national security impact might exist. The U.S. Army's Joint Base Lewis-McChord Military Reservation (JBLM) is the only DOD land included within the proposed designation of critical habitat. As described above, in preparing this proposal, we are considering JBLM for exemption from the designation of critical habitat under section 4(a)(3) of the Act, pending our evaluation of their revised INRMP, scheduled for completion in 2012, to determine whether it provides a conservation benefit to the species under consideration in this proposed rule. We have determined that the remaining lands within the proposed designation of critical habitat for the species are not owned or managed by the Department of Defense, and, therefore, we anticipate no impact on national security. Consequently, the Secretary is not intending to exert his discretion to exclude any areas from the final designation based on impacts on national security.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts to national security, of specifying any particular area as critical habitat. We consider a number of factors, including whether landowners have developed any HCPs or other management plans for the area, or whether there are conservation partnerships or relationships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any tribal issues, and consider the government-to-government relationship of the United States with tribal entities. We also consider any other relevant impacts that might occur because of the designation. Our weighing of the benefits of inclusion versus exclusion considers all relevant factors in making a final determination as to what will result in the greatest conservation benefit to the listed species. Depending on the specifics of each situation, there may be cases where the designation of critical habitat will not necessarily provide enhanced protection, and may actually lead to a net loss of conservation benefit. Here we present a brief description of three general areas considered for exclusion from the final designations of critical habitat for the subspecies.

We are considering the exclusion of private lands associated with the Scatter Creek Wildlife Area and Rock Prairie (Unit 1, subunits 1–G and 1–H for the Mazama pocket gopher), both within Thurston County. The first proposed exclusion is located in the south Puget Sound region, in the Scatter Creek subunit of Unit 1, the South Sound Unit subunit 1–G for the Mazama pocket gopher. We are considering excluding private lands in this unit totaling 98 ac (40 ha) based on the benefits of partnerships, HCPs, and other conservation agreements.

The second area is located in the south Puget Sound, in the Rock Prairie subunit also in Unit 1, the South Sound Unit. This is subunit 1–H for the Mazama pocket gopher. In this subunit, 379 ac (153 ha) is considered for exclusion as they are managed under a permanent conservation easement and a Grassland Reserve Program Management Plan agreement with NRCS.

Each area contains one landholding that is under a conservation easement for agriculture and open space protection, species conservation, and/or prairie conservation. We are considering the exclusion of these privately-owned lands (1–G and 1–H for the Mazama pocket gopher in the South Sound Unit) based on the partnerships that have been developed for the conservation of the Mazama pocket gopher subspecies as evidenced by the management plan and conservation easement on those private lands as well as the conservation benefit to the species from the management plan.

We request public comments on the relative benefits of inclusion or exclusion of these areas (Table 3) from the designation of critical habitat. At present, we seek public comment on the general benefits of including or excluding private lands in this area (see PUBLIC COMMENTS).

TABLE 3—LANDS PROPOSED OR THAT MAY BE CONSIDERED FOR EXCLUSION FROM THE FINAL RULE TO DESIGNATE CRITICAL HABITAT FOR SEVERAL PUGET SOUND SPECIES

Type of agreement	Critical habitat unit name	State	Name of agreement/entity	Acres	Hectares
Habitat Conservation Plans—proposed for exclusion.	Unit 1-South Sound; Subunits MPG: 1–D.	WA	Washington Department of Natural Resources State Lands.	35	14
Conservation Agreements, Other agreements or Partnerships—proposed for exclusion.	Unit 1—South Sound; Subunit MPG: 1–G.	WA	Scatter Creek Wildlife Area Private Landowner Management Plan.	98	40
	Unit 1–South Sound; Subunit MPG: 1–H.	WA	Rock Prairie Grassland Easement and Private Landowner Partnership.	379	153
Total Proposed	.....		.....	512	207

Benefits of Excluding Lands with Habitat Conservation Plans

Habitat Conservation Plans (HCPs) are planning documents required as part of an application for an ''incidental take'' permit. They describe the anticipated effects of the proposed taking; how those impacts will be minimized, or mitigated; and how the HCP is to be funded. HCPs can apply to both listed and nonlisted species, including those that are candidates or have been proposed for listing. Anyone whose otherwise-lawful activities will result in the ''incidental take'' of a listed wildlife species needs a permit. The Act defines ''take'' as ''* * * to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.'' ''Harm'' includes significant habitat modification that actually kills or injures a listed species through impairing essential behavior such as breeding, feeding, or sheltering. Section 9 of the Act prohibits the take of endangered and threatened species. The purpose of the incidental take permit is to exempt non-Federal permit-holders—such as States and private landowners—from the prohibitions of section 9, not to authorize the activities that result in take.

In developing HCPs, people applying for incidental take permits describe measures designed to minimize and mitigate the effects of their actions— to ensure that species will be conserved and to contribute to their recovery. Habitat Conservation Plans are required to meet the permit issuance criteria of section 10(a)(2)(B) of the Act:

- Taking will be incidental;
- The applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the taking;
- The applicant will ensure that adequate funding for the plan will be provided;
- Taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
- Other measures, as required by the Secretary, will be met.

The benefits of excluding lands with approved HCPs from critical habitat designation may include relieving landowners, communities, and counties of any additional regulatory burden that might be imposed as a result of the critical habitat designation. Many HCPs take years to develop and, upon completion, are consistent with the recovery objectives for listed species covered within the plan area. Many conservation plans also provide conservation benefits to unlisted sensitive species.

A related benefit of excluding lands covered by approved HCPs from critical habitat designation is that it can make it easier for us to seek new partnerships with future plan participants, including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. HCPs often cover a wide range of species, including species that are not State and federally listed and would otherwise receive little protection from development. By excluding these lands, we preserve our current partnerships and encourage additional future conservation actions.

We also note that permit issuance in association with HCP applications requires consultation under section 7(a)(2) of the Act, which would include the review of the effects of all HCP-covered activities that might adversely impact the species under a jeopardy standard, including possibly significant habitat modification (see definition of ''harm'' at 50 CFR 17.3), even without the critical habitat designation. In addition, all other Federal actions that may affect the listed species would still require consultation under section 7(a)(2) of the Act, and we would review these actions for possible significant habitat modification in accordance with the definition of harm referenced above.

We consider a current HCP to be appropriate for consideration for exclusion from a final critical habitat designation under section 4(b)(2) of the Act if:

(1) It provides for the conservation of the essential physical and biological features or areas otherwise determined to be essential;

(2) There is a reasonable expectation that the conservation management strategies and actions contained in a management plan will be implemented into the future;

(3) The conservation strategies in the HCP are likely to be effective; and

(4) The HCP contains a monitoring program or adaptive management to ensure that the conservation measures are effective and can be adapted in the future in response to new information.

Below is a brief description of each HCP and the lands proposed as critical habitat covered by each plan that we are proposing to exclude under section 4(b)(2) of the Act from the final designation of critical habitat.

Washington State Department of Natural Resources State Lands Habitat Conservation Plan

We are proposing to exclude lands managed under the Washington State Department of Natural Resources (WDNR) State Lands HCP in one critical habitat subunit in Washington from the final critical habitat designation for the four Thurston/Pierce subspecies of Mazama pocket gopher (Olympia, Roy Prairie, Tenino, and Yelm). The WDNR State Lands HCP covers approximately 1.6 million ac (730,000 ha) of State forest lands. The majority of the area covered by the HCP is west of the Cascade Crest including the Olympic Peninsula. The permit associated with this HCP, issued January 30, 1997 (61 FR 15297, April 5, 1996), has a term of 70 to 100 years, and covers activities primarily associated with commercial forest management, but also includes limited, non-timber activities such as some recreational activities. The HCP

covers all federally listed species in Washington that use the types of habitats provided by covered lands at the time the HCP was approved, and those species that have similar habitat affinities and become listed after the HCP was approved and an incidental take permit (ITP) was issued. If listed, the four Thurston/Pierce subspecies of Mazama pocket gopher (Olympia, Roy Prairie, Tenino, and Yelm) would be added to the WDNR ITP per Section 7 and 12.6 of the Implementing Agreement (Appendix B of the HCP).

The HCP addressed multiple species through a combination of strategies. The main focus of these strategies is the riparian ecosystems (salmonids), northern spotted owl, and the marbled murrelet. The main objective of these strategies was to maintain and promote late successional forest habitats along riparian corridors and in upland locations that would benefit spotted owls and marbled murrelets. It was envisioned that the conservation strategies for salmonids, spotted owls, and marbled murrelets would serve to reduce the risk of extinction for the other wildlife species covered by the HCP. In addition, a fourth emphasis of the HCP was to provide protection for species that relied on uncommon or unique habitats. For these species, additional measures were developed to meet the conservation objectives of the HCP. These measures specifically address the protection of talus, caves, cliffs, balds, oak woodlands, mineral springs, large snags, and large, structurally unique trees because these features are difficult to restore or recreate. In addition, as noted in the HCP, at the time a new species is proposed for listing, DNR provides a written request to add that species to its ITP and evaluates and considers additional protection measures such as seasonal restrictions and protection of nesting/denning sites.

The WDNR also manages approximately 66,000 ac (26,710 ha) of non-trust lands as NAPs. A portion of Rocky Prairie (subunit 1–D) is located within a WDNR Natural Area Preserve (NAP). While not subject to the HCP, the Service recognizes the habitat contributions provided by these lands in terms of meeting the conservation goals and objectives of the HCP. NAPs provide the highest level of protection for excellent examples of unique or typical land features in Washington State. Some of these protected lands currently provide habitat in areas identified as ''critical'' for the Tenino and Yelm pocket gophers at the Rocky Prairie NAP. Details of the WDNR HCP are available at *http://www.dnr.wa.gov/researchscience/topics/trustlandshcp/Pages/Home.aspx.*

Federal Lands

As noted above, Federal agencies have an independent responsibility under section 7(a)(1) of the Act to use their programs in furtherance of the Act and to utilize their authorities to carry out programs for the conservation of endangered and threatened species. We consider the development and implementation of land management plans by Federal agencies to be consistent with this statutory obligation under section 7(a)(1) of the Act. Therefore, Federal land management plans, in and of themselves, are generally not an appropriate basis for exclusion from critical habitat. The Secretary is not intending to exercise his discretion to exclude any Federal lands from the designation of critical habitat.

Consideration of Indian Lands

In accordance with the Secretarial Order 3206, ''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act'' (June 5, 1997); the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951); Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments'' (November 6, 2000, and as reaffirmed November 5, 2009); and the relevant provision of the Departmental Manual of the Department of the Interior (512 DM 2), we believe that fish, wildlife, and other natural resources on Indian lands may be better managed under Indian authorities, policies, and programs than through Federal regulation where Indian management addresses the conservation needs of listed species. In addition, such designation may be viewed by tribes as unwarranted and an unwanted intrusion into Indian self-governance, thus compromising the government-to-government relationship essential to achieving our mutual goals of managing for healthy ecosystems upon which the viability of threatened and endangered species populations depend.

We have determined that there are no reserved tribal lands occupied by the four Thurston/Pierce County subspecies of Mazama pocket gopher that contain the physical or biological features essential to conservation of the species, and no reserved tribal lands unoccupied by the species that are essential for the conservation of the species. Therefore, we are not proposing to designate critical habitat for the Mazama pocket gopher on tribal lands.

Peer Review

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We have invited these peer reviewers to comment during this public comment period on our specific assumptions and conclusions regarding the proposal to list the Olympia, Roy Prairie, Tenino, and Yelm subspecies of Mazama pocket gopher our proposed critical habitat for these species as well as our other determinations.

We will consider all comments and information received during this comment period on this proposed rule during our preparation of a final determination. Accordingly, the final decision may differ from this proposal.

Public Hearings

Section 4(b)(5) of the Act provides for one or more public hearings on this proposal, if requested. Requests must be received within 45 days after the date of publication of this proposed rule in the **Federal Register**. Such requests must be sent to the address shown in the **ADDRESSES** section. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing.

Required Determinations

Regulatory Planning and Review—Executive Orders 12866 and 13563

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes

further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C 801 *et seq.*), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include such businesses as manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and forestry and logging operations with fewer than 500 employees and annual business less than $7 million. To determine whether small entities may be affected, we will consider the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

Importantly, the incremental impacts of a rule must be *both* significant and substantial to prevent certification of the rule under the RFA and to require the preparation of an initial regulatory flexibility analysis. If a substantial number of small entities are affected by the proposed critical habitat designation, but the per-entity economic impact is not significant, the Service may certify. Likewise, if the per-entity economic impact is likely to be significant, but the number of affected entities is not substantial, the Service may also certify.

Under the RFA, as amended, and following recent court decisions, Federal agencies are only required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself, and not the potential impacts to indirectly affected entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried by the Agency is not likely to adversely modify critical habitat. Therefore, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Under these circumstances, it is our position that only Federal action agencies will be directly regulated by this designation. Therefore, because Federal agencies are not small entities, the Service may certify that the proposed critical habitat rule will not have a significant economic impact on a substantial number of small entities.

We acknowledge, however, that in some cases, third-party proponents of the action subject to permitting or funding may participate in a section 7 consultation, and thus may be indirectly affected. We believe it is good policy to assess these impacts if we have sufficient data before us to complete the necessary analysis, whether or not this analysis is strictly required by the RFA. While this regulation does not directly regulate these entities, in our draft economic analysis we will conduct a brief evaluation of the potential number of third parties participating in consultations on an annual basis in order to ensure a more complete examination of the incremental effects of this proposed rule in the context of the RFA.

In conclusion, we believe that, based on our interpretation of directly regulated entities under the RFA and relevant case law, this designation of critical habitat will only directly regulate Federal agencies which are not by definition small business entities. And as such, certify that, if promulgated, this designation of critical habitat would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required. However, though not necessarily required by the RFA, in our draft economic analysis for this proposal we will consider and evaluate the potential effects to third parties that may be involved with consultations with Federal action agencies related to this action.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. We do not expect the designation of this proposed critical habitat to significantly affect energy supplies, distribution, or use as these species and proposed critical habitat do not appear to overlap with these areas. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment as warranted.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(1) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or Tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal

Government's responsibility to provide funding,'' and the State, local, or Tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule will significantly or uniquely affect small governments. Government lands being proposed for critical habitat designation are owned by Washington State Department of Fish and Wildlife, Washington Department of Natural Resources, Department of Defense (Army), the U.S. Forest Service, and Thurston County Parks and Recreation, in Washington. None of these government entities fit the definition of ''small governmental jurisdiction.'' Therefore, a Small Government Agency Plan is not required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment as warranted. Therefore, a Small Government Agency Plan is not required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment if appropriate.

Takings—Executive Order 12630

In accordance with Executive Order 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the four Thurston/Pierce subspecies of Mazama pocket gopher in a takings implications assessment. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. The takings implications assessment concludes that this designation of critical habitat for the four Thurston/Pierce subspecies of Mazama pocket gopher does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with Executive Order 13132 (Federalism), this proposed rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this proposed critical habitat designation with appropriate State resource agencies in Washington. The designation of critical habitat in areas currently occupied by the four Thurston/Pierce subspecies of Mazama pocket gopher imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments because the areas that contain the physical or biological features essential to the conservation of the species are more clearly defined, and the elements of the features of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. This proposed rule uses standard property descriptions and identifies the elements of physical or biological features essential to the conservation of the four Thurston/Pierce subspecies of Mazama pocket gopher within the proposed designated areas to assist the public in understanding the habitat needs of the species.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), need not be prepared in connection with listing a species as endangered or threatened under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to NEPA in connection with designating critical habitat under the

Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes.

We have determined that there are no Tribal lands occupied by the four Thurston/Pierce subspecies of Mazama pocket gopher that contain the physical or biological features essential to conservation of the subspecies, and no Tribal lands unoccupied by the subspecies that are essential for the conservation of the subspecies. Therefore, we are not proposing to designate critical habitat for the Mazama pocket gopher on Tribal lands.

References Cited

A complete list of references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* and upon request from the Washington Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this package are the staff members of the Washington Fish and Wildlife Office, Lacey, Washington, and the Oregon Fish and Wildlife Office, Portland, Oregon.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. Amend § 17.11(h), the List of Endangered and Threatened Wildlife, by adding entries for ''Pocket gopher, Olympia (*Thomomys mazama pugetensis*)'', ''Pocket gopher, Roy Prairie'' (*Thomomys mazama glacialis*)'', ''Pocket gopher, Tenino (*Thomomys mazama tumuli*)'', and ''Pocket gopher, Yelm (*Thomomys mazama yelmensis*)'' in alphabetical order under Mammals, to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historical range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
MAMMALS							
*	*	*	*	*	*		*
Pocket gopher, Olympia.	*Thomomys mazama pugetensis.*	U.S.A. (WA)	U.S.A. (WA)	T	.....	17.95(a)	17.40(a)
Pocket gopher, Roy Prairie.	*Thomomys mazama glacialis.*	U.S.A. (WA)	U.S.A. (WA)	T	.....	17.95(a)	17.40(a)
Pocket gopher, Tenino.	*Thomomys mazama tumuli.*	U.S.A. (WA)	U.S.A. (WA)	T	.....	17.95(a)	17.40(a)
Pocket gopher, Yelm	*Thomomys mazama yelmensis.*	U.S.A. (WA)	U.S.A. (WA)	T	.....	17.95(a)	17.40(a)
*	*	*	*	*	*		*

3. Amend § 17.40 by adding paragraph (a) to read as follows:

§ 17.40 Special rules—mammals.

(a) Mazama pocket gophers (Olympia, Tenino, Yelm, and Roy Prairie) *(Thomomys mazama pugetensis, tumuli, yelmensis, and glacialis).*

(1) *Which populations of the Mazama pocket gophers are covered by this special rule?* This rule covers the four Thurston/Pierce subspecies of Mazama pocket gopher (Olympia, Tenino, Yelm, and Roy Prairie) *(Thomomys mazama pugetensis, tumuli, yelmensis, and glacialis)* wherever they occur.

(2) *What activities are prohibited?* Except as noted in paragraphs (a)(3)

through (a)(5) of this section, all prohibitions of § 17.31 will apply to the Olympia, Tenino, Yelm, and Roy Prairie pocket gophers.

(3) *What agricultural activities are allowed on non-Federal lands?* Incidental take of the Olympia, Tenino, Yelm, and Roy Prairie pocket gophers will not be a violation of section 9 of the Act, if the incidental take results from routine farming, seed nursery, or ranching activities located in or adjacent to Mazama pocket gopher habitat on non-Federal lands. Routine farming, seed nursery, or ranching activities are limited to the following:

(i) Livestock grazing according to normally acceptable and established levels of intensity in terms of the number of head of livestock per acre of rangeland.

(ii) Routine management and maintenance of stock ponds and berms to maintain livestock water supplies. Such activities shall not involve the use of heavy equipment.

(iii) Routine maintenance or construction of open-wire fences for grazing management.

(iv) Planting, harvest, or rotation of crops when such activities occur between November 1 and February 28 (inclusive).

(v) Maintenance of livestock management facilities such as corrals, sheds, and other ranch outbuildings.

(vi) Repair and maintenance of unimproved ranch roads. This exemption does not include improvement, upgrade, or construction of new roads.

(vii) Discing of fencelines or perimeter areas for fire prevention control when such activities occur between November 1 and February 28 (inclusive).

(viii) Placement of mineral supplements.

(ix) Control and management of noxious weeds through mowing, herbicide application, and burning. Use of herbicides and burning must occur in such a way that nontarget plants are not affected.

(4) *What activities are allowed on airports on non-Federal lands?* Incidental take of the Olympia, Tenino, Yelm, and Roy Prairie pocket gophers will not be a violation of section 9 of the Act, if the incidental take results from routine maintenance activities in or adjacent to Mazama pocket gopher habitat and associated with airport operations located on non-Federal lands. Routine maintenance activities include the following and do not involve the use of heavy equipment that would crush burrows or compact soils:

(i) Routine management, repair, and maintenance of roads and runways (does not include upgrades, or construction of new roads or runways or new development at airports); and

(ii) Control and management of noxious weeds and grass through mowing, herbicide application, or burning. Use of herbicides and burning must occur in such a way that nontarget plants are not affected.

(5) *What activities are allowed on private land?* Incidental take of the Olympia, Tenino, Yelm, and Roy Prairie pocket gophers will not be a violation of section 9 of the Act, if the incidental take results from noncommercial activities that occur in or adjacent to Mazama pocket gopher habitat on existing single-family residential properties. These activities could include, but are not limited to, the following, and must not involve the use of heavy equipment:

(i) Control and management of invasive plants and grass through mowing, herbicide application, or burning. Use of herbicides and burning must occur in such a way that nontarget plants are not affected;

(ii) Construction and placement of above-ground fencing, play equipment, and dog kennels less than 100 ft^2 (9.29 m^2) only if on block, or above-ground, footings; and (iii) Construction of carports, or storage sheds less than 100 ft^2 (9.29 m^2), only if on block, or above-ground, footings.

* * * * *

3. Amend § 17.95(a) by adding entries for ''Olympia pocket gopher (*Thomomys mazama pugetensis)'', ''*Roy Prairie pocket gopher (*Thomomys mazama glacialis)'', ''*Tenino pocket gopher (*Thomomys mazama tumuli)'',* and ''Yelm pocket gopher (*Thomomys mazama yelmensis*)'' in the same order that these species appear in the table in § 17.11(h), to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

(a) *Mammals.*

* * * * *

Olympia Pocket Gopher (*Thomomys mazama pugetensis*)

(1) Critical habitat units are depicted for Thurston County, Washington, on the maps below.

(2) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of Olympia pocket gopher consist of:

(i) Friable, loamy, and deep soils, some with relatively greater content of sand, gravel, or silt, all generally on slopes less than 15 percent in the following series:

(A) Alderwood;

(B) Cagey;

(D) Everett;

(E) Indianola;

(F) McKenna;

(G) Nisqually;

(H) Norma;

(I) Spana;

(J) Spanaway;

(K) Spanaway-Nisqually complex; and

(L) Yelm.

(ii) Areas equal to or larger than 50 ac (20 ha) in size that provide for breeding, foraging, and dispersal activities, found in the soil series listed in paragraph (2)(i) of this entry that have:

(A) Less than 10 percent woody vegetation cover.

(B) Vegetative cover suitable for foraging by gophers. Pocket gophers' diets include a wide variety of plant material, including leafy vegetation, succulent roots, shoots, tubers, and grasses. Forbs and grasses that Mazama pocket gophers eat are known to include, but are not limited to: *Achillea millefolium* (common yarrow), *Agoseris* spp. (agoseris), *Cirsium* spp. (thistle), *Bromus* spp. (brome), *Camassia* spp. (camas), *Collomia linearis* (tiny trumpet), *Epilobium spp.* (several willowherb spp.), *Eriophyllum lanatum* (woolly sunflower), *Gayophytum diffusum* (groundsmoke), *Hypochaeris radicata* (hairy cat's ear), *Lathyrus* spp. (peavine), *Lupinus* spp. (lupine), *Microsteris gracilis* (slender phlox), *Penstemon* spp. (penstemon), *Perideridia gairdneri* (Gairdner's yampah), *Phacelia heterophylla* (varileaf phacelia), *Polygonum douglasii* (knotweed), *Potentilla* spp. (cinquefoil), *Pteridium aquilinum* (bracken fern), *Taraxacum officinale* (common dandelion), *Trifolium* spp. (clover), and *Viola* spp. (violet).

(C) Few, if any, barriers to dispersal. Barriers to dispersal include, but are not limited to: open water; steep slopes (greater than 35 percent); wide expanses of rhizomatous grasses; concrete; large areas of rock; development and buildings; and soils or substrates inappropriate for burrowing.

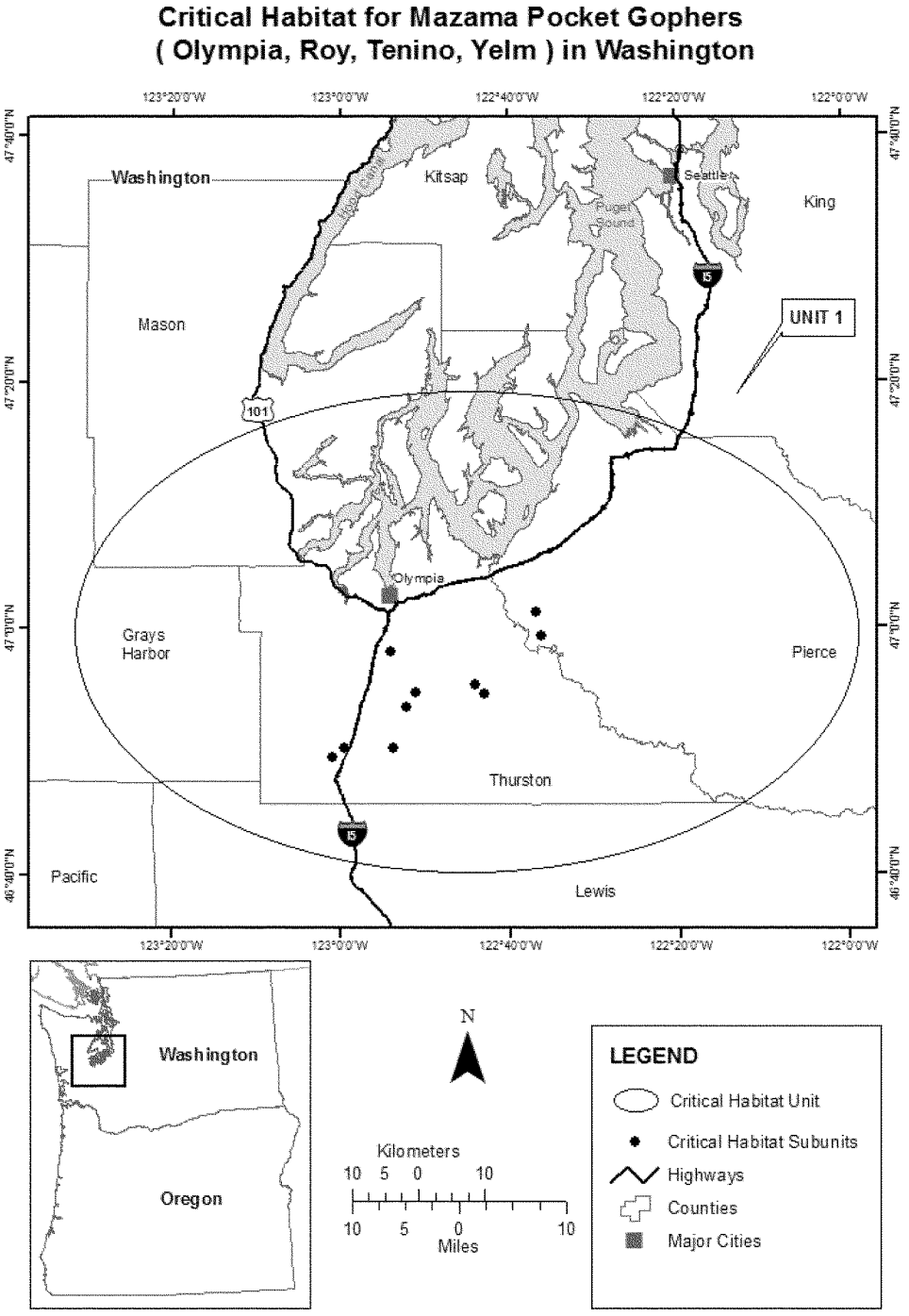
(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on [DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE].

(4) *Critical habitat map units.* Data layers defining the map units were created on 2010 aerial photography from U.S. Department of Agriculture, National Agriculture Imagery Program base maps using ArcMap (Environmental Systems Research Institute, Inc.), a computer geographic information system (GIS) program. The

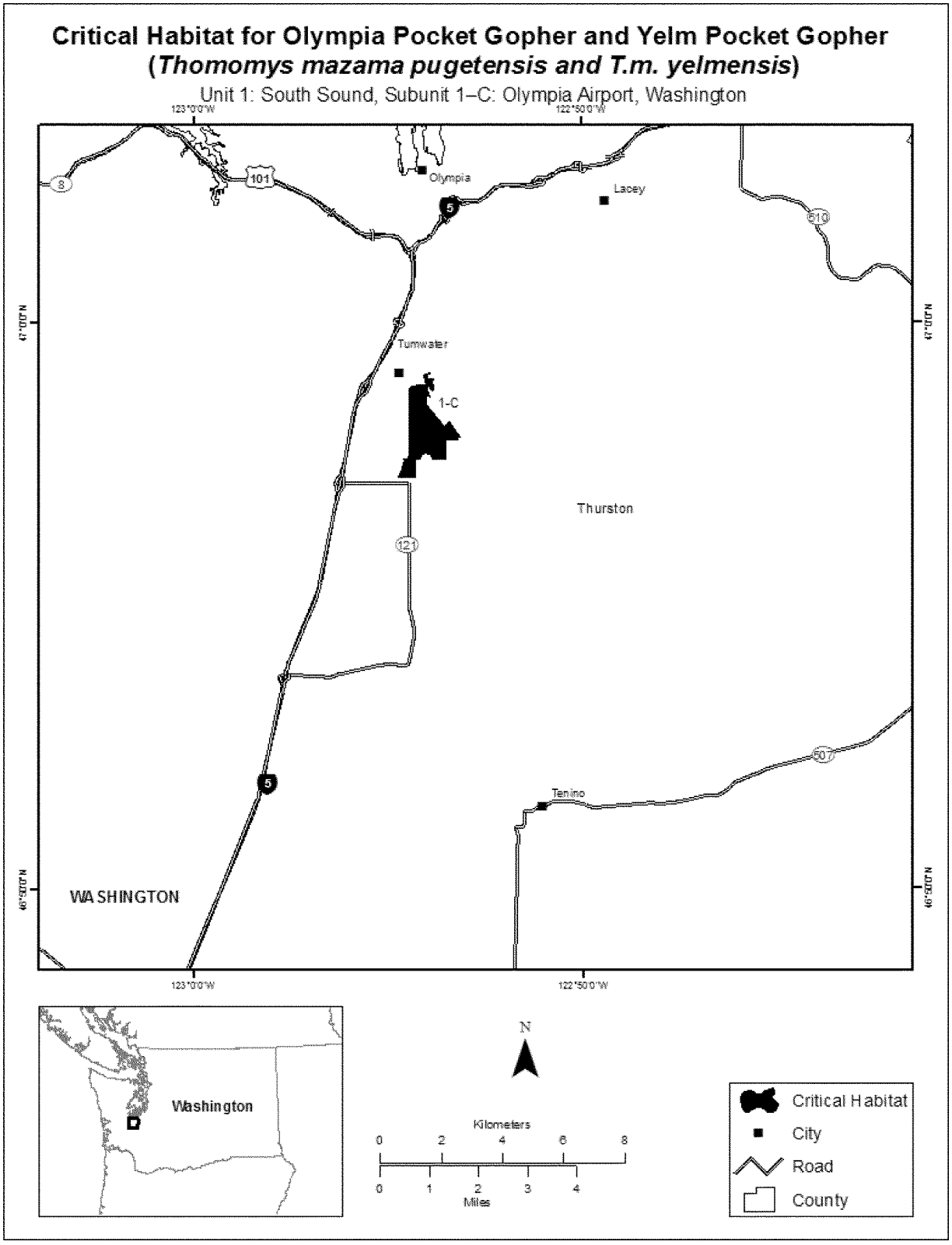
maps in this entry establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's internet site, (*http://www.fws.gov/wafwo/*), Regulations.gov (*http://www.regulations.gov* at Docket No. FWS–R1–ES–2012–0088), and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) **Note**: Index map follows:

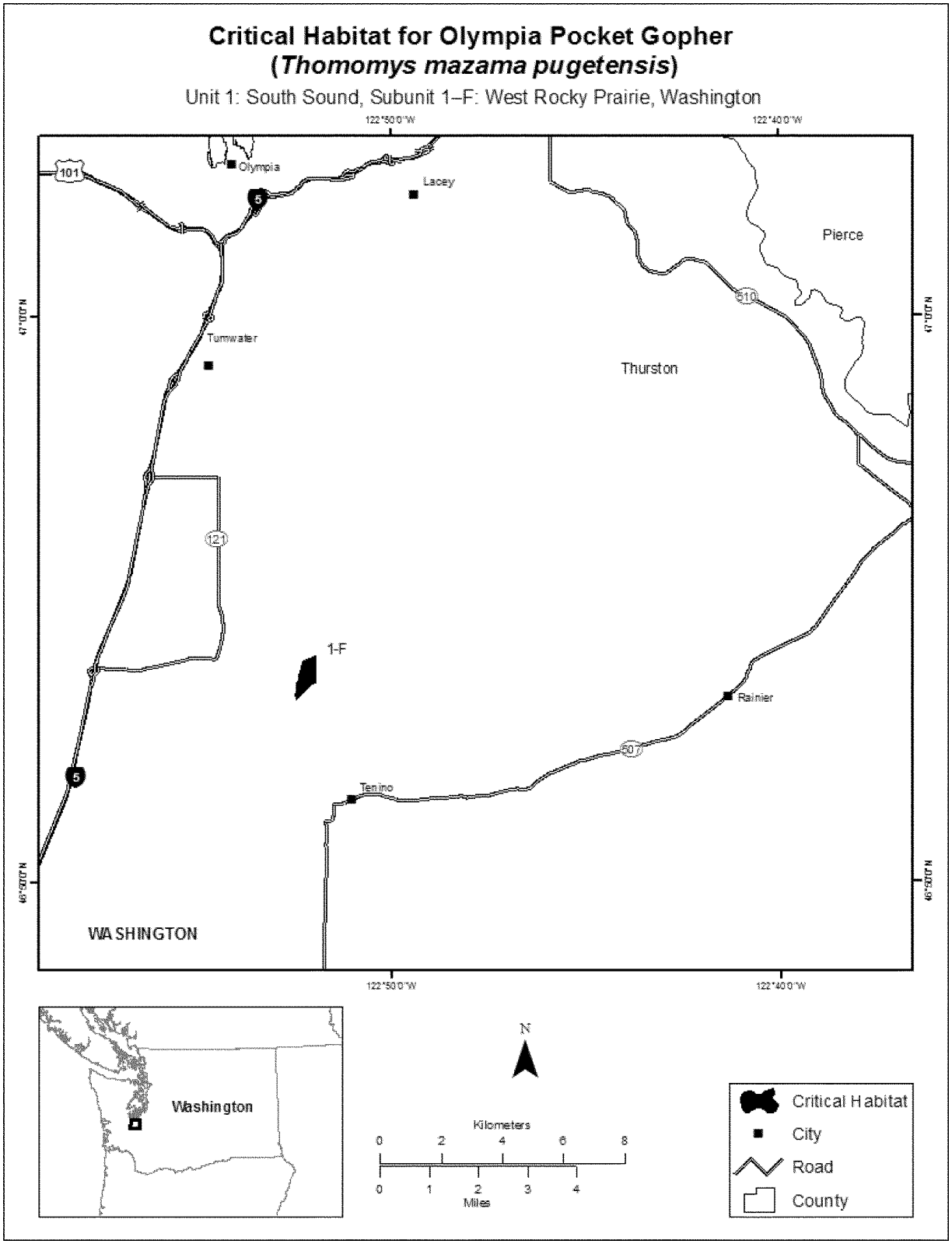
BILLING CODE 4310–55–P



(6) Unit 1—South Sound, Subunit 1–C: Olympia Airport, Thurston County, Washington. Map of Unit 1, Subunit 1–C follows:



(7) Unit 1—South Sound, Subunit 1–F: West Rocky Prairie, Thurston County, Washington. Map of Unit 1, Subunit 1–F follows:



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Roy Prairie Pocket Gopher (*Thomomys mazama glacialis*)

(1) Critical habitat units are depicted for Thurston and Pierce Counties in Washington on the maps below.

(2) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of Roy Prairie pocket gopher consist of:

(i) Friable, loamy, and deep soils, some with relatively greater content of sand, gravel, or silt, all generally on slopes less than 15 percent in the following series:

(A) Everett;

(B) Indianola;

(C) Nisqually;

(D) Norma; and

(E) Spanaway.

(ii) Areas equal to or larger than 50 ac (20 ha) in size that provide for breeding, foraging, and dispersal activities, found in the soil series listed in paragraph (2)(i) of this entry that have:

(A) Less than 10 percent woody vegetation cover.

(B) Vegetative cover suitable for foraging by gophers. Pocket gophers' diets include a wide variety of plant material, including leafy vegetation, succulent roots, shoots, tubers, and grasses. Forbs and grasses that Mazama pocket gophers are known to eat include, but are not limited to: *Achillea millefolium* (common yarrow), *Agoseris* spp. (agoseris), *Cirsium* spp. (thistle), *Bromus* spp. (brome), *Camassia* spp. (camas), *Collomia linearis* (tiny trumpet), *Epilobium spp.* (several willowherb spp.), *Eriophyllum lanatum* (woolly sunflower), *Gayophytum diffusum* (groundsmoke), *Hypochaeris radicata* (hairy cat's ear), *Lathyrus* spp. (peavine), *Lupinus* spp. (lupine), *Microsteris gracilis* (slender phlox), *Penstemon* spp. (penstemon), *Perideridia gairdneri* (Gairdner's yampah), *Phacelia heterophylla* (varileaf phacelia), *Polygonum douglasii* (knotweed), *Potentilla* spp. (cinquefoil), *Pteridium aquilinum* (bracken fern), *Taraxacum officinale* (common dandelion), *Trifolium* spp. (clover), and *Viola* spp. (violet).

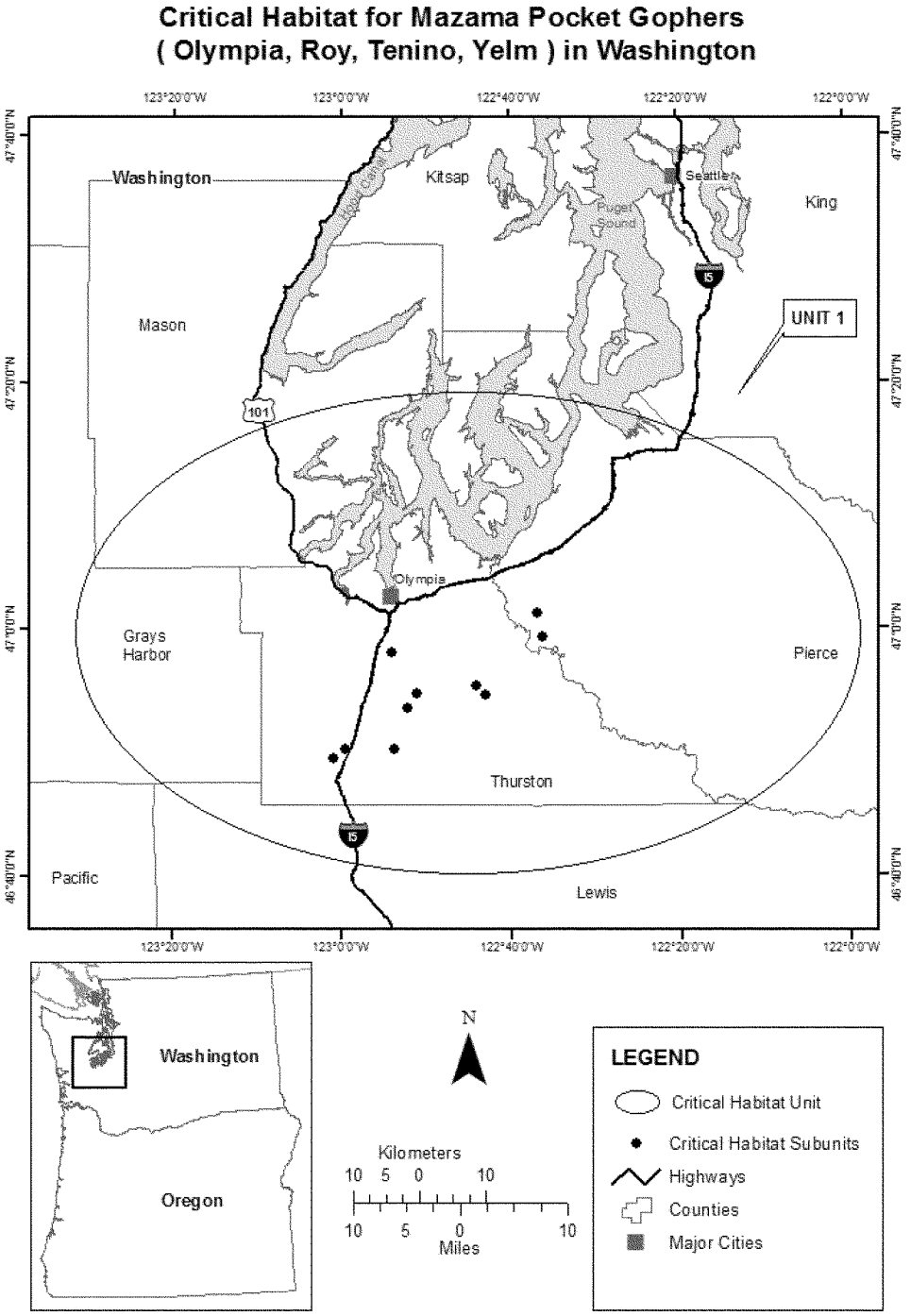
(C) Few, if any, barriers to dispersal. Barriers to dispersal include, but are not limited to: open water; steep slopes (greater than 35 percent); wide expanses of rhizomatous grasses; concrete; large areas of rock; development and buildings; and soils or substrates inappropriate for burrowing.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on [DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE].

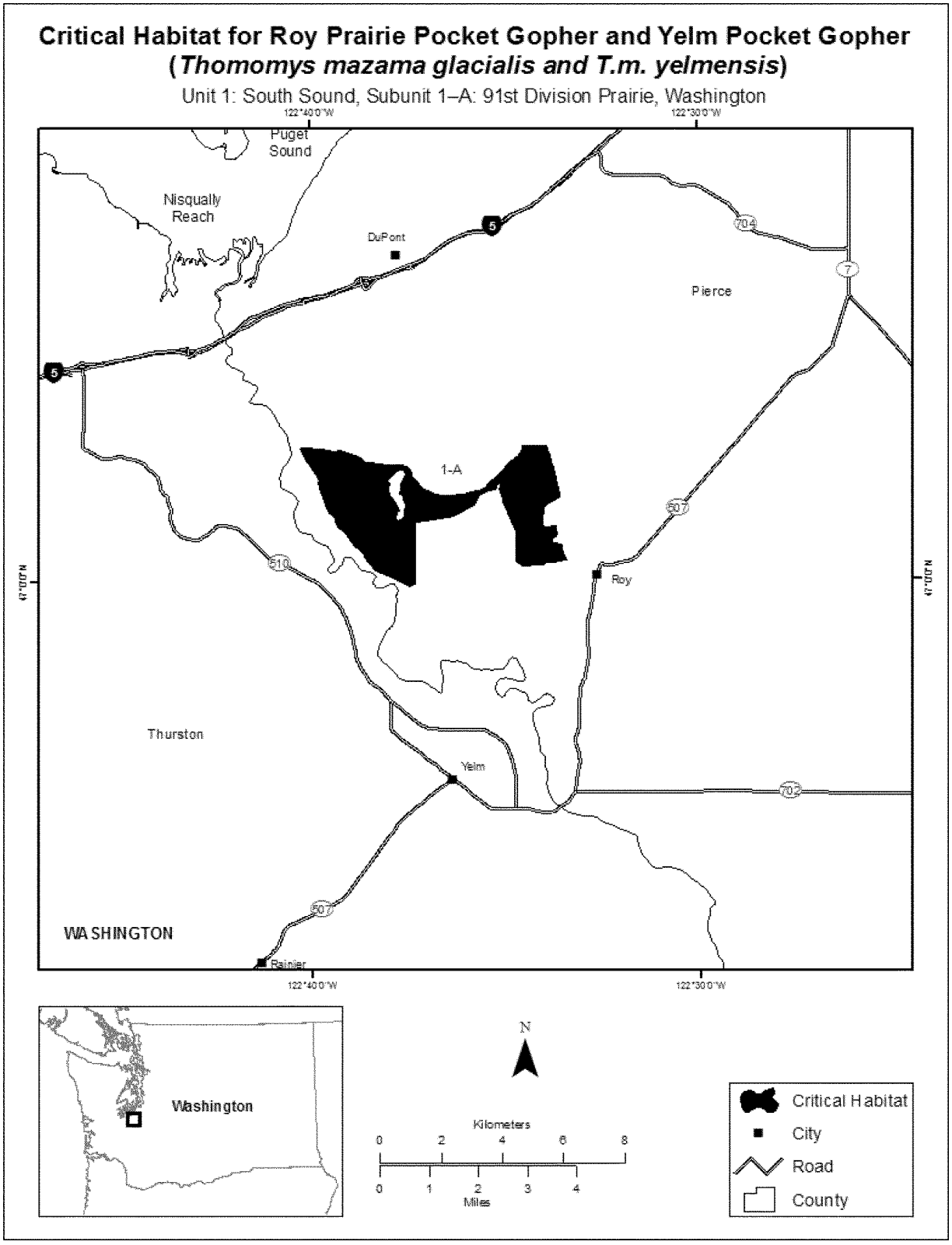
(4) *Critical habitat map units.* Data layers defining the map units were created on 2010 aerial photography from U.S. Department of Agriculture, National Agriculture Imagery Program base maps using ArcMap (Environmental Systems Research Institute, Inc.), a computer geographic information system (GIS) program. The maps in this entry establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's internet site, (at *http://www.fws.gov/wafwo/*), Regulations.gov (*http://www.regulations.gov* at Docket No. FWS–R1–ES–2012–0088), and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) **Note**: Index map follows:

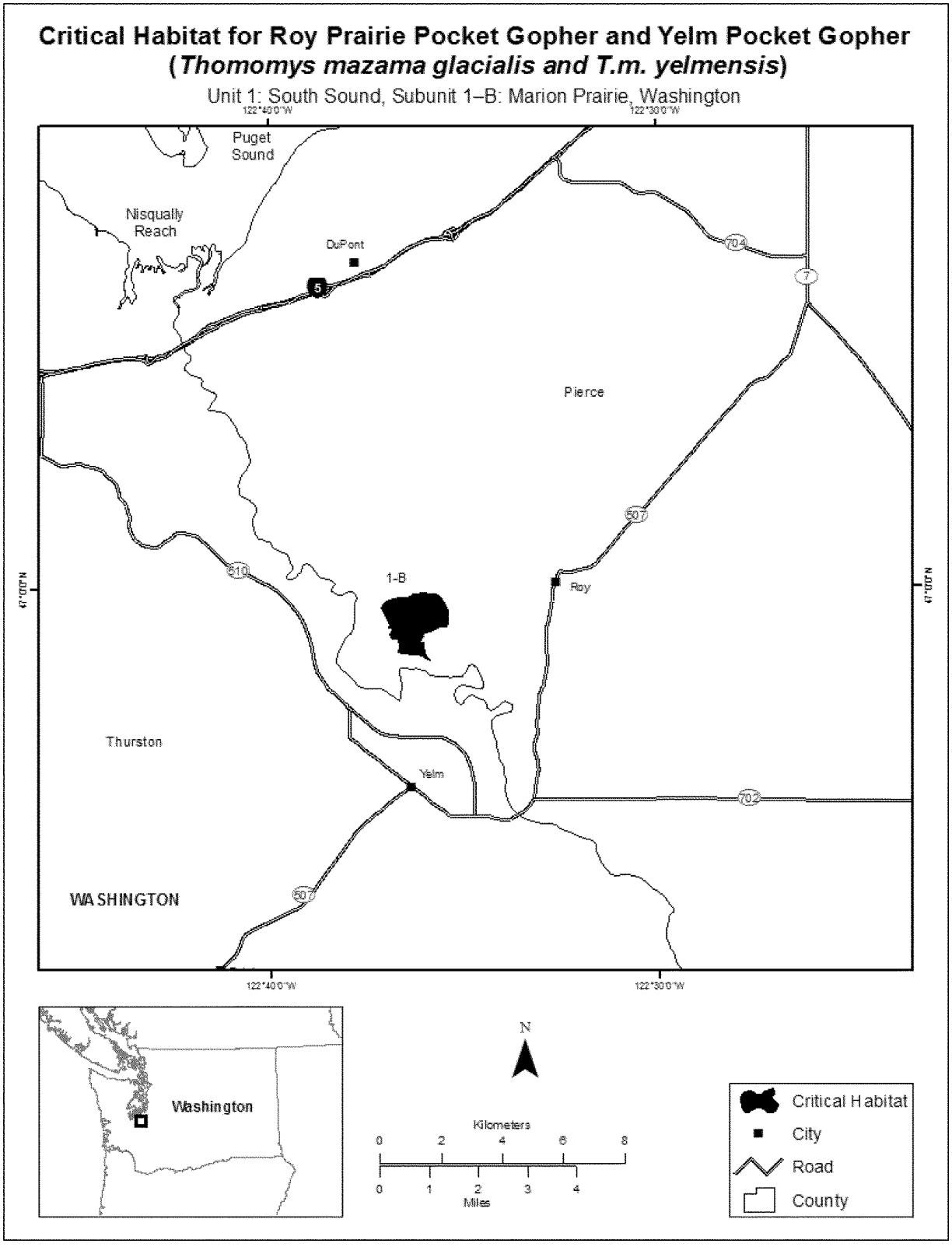
BILLING CODE 4310–55–P



(6) Unit 1—South Sound. Subunit 1–A: 91st Division Prairie, Pierce County, Washington. Map of Unit 1, Subunit 1–A follows:



(7) Unit 1—South Sound, Subunit 1–B: Marion Prairie, Thurston County, Washington. Map of Unit 1, Subunit 1–B follows:



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Tenino Pocket Gopher (*Thomomys mazama tumuli*)

(1) Critical habitat units are depicted for Thurston County in Washington on the maps below.

(2) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of Tenino pocket gopher consist of two components:

(i) Friable, loamy, and deep soils, some with relatively greater content of sand, gravel, or silt, all generally on slopes less than 15 percent in the following series:

(A) Everett;

(B) Nisqually;

(C) Norma;

(D) Spanaway; and

(E) Spanaway-Nisqually complex.

(ii) Areas equal to or larger than 50 ac (20 ha) in size that provide for breeding, foraging, and dispersal activities, found in the soil series listed in paragraph (2)(i) of this entry that have:

(A) Less than 10 percent woody vegetation cover.

(B) Vegetative cover suitable for foraging by gophers. Pocket gophers' diets include a wide variety of plant material, including leafy vegetation, succulent roots, shoots, tubers, and grasses. Forbs and grasses that Mazama pocket gophers are known to eat include, but are not limited to: *Achillea millefolium* (common yarrow), *Agoseris* spp. (agoseris), *Cirsium* spp. (thistle), *Bromus* spp. (brome), *Camassia* spp. (camas), *Collomia linearis* (tiny trumpet), *Epilobium spp.* (several willowherb spp.), *Eriophyllum lanatum* (woolly sunflower), *Gayophytum diffusum* (groundsmoke), *Hypochaeris radicata* (hairy cat's ear), *Lathyrus* spp. (peavine), *Lupinus* spp. (lupine), *Microsteris gracilis* (slender phlox), *Penstemon* spp. (penstemon), *Perideridia gairdneri* (Gairdner's yampah), *Phacelia heterophylla* (varileaf phacelia), *Polygonum douglasii* (knotweed), *Potentilla* spp. (cinquefoil), *Pteridium aquilinum* (bracken fern), *Taraxacum officinale* (common dandelion), *Trifolium* spp. (clover), and *Viola* spp. (violet).

(C) Few, if any, barriers to dispersal. Barriers to dispersal include, but are not limited to: open water; steep slopes (greater than 35 percent); wide expanses of rhizomatous grasses; concrete; large areas of rock; development and buildings; and soils or substrates inappropriate for burrowing.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on [DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE].

(4) *Critical habitat map unit.* Data layers defining the map unit were created on 2010 aerial photography from U.S. Department of Agriculture, National Agriculture Imagery Program base maps using ArcMap (Environmental Systems Research Institute, Inc.), a computer geographic information system (GIS) program. The maps in this entry establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's internet site, (*http://www.fws.gov/wafwo/*), Regulations.gov (*http://www.regulations.gov* at Docket No. FWS–R1–ES–2012–0088), and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) **Note:** Index map follows:

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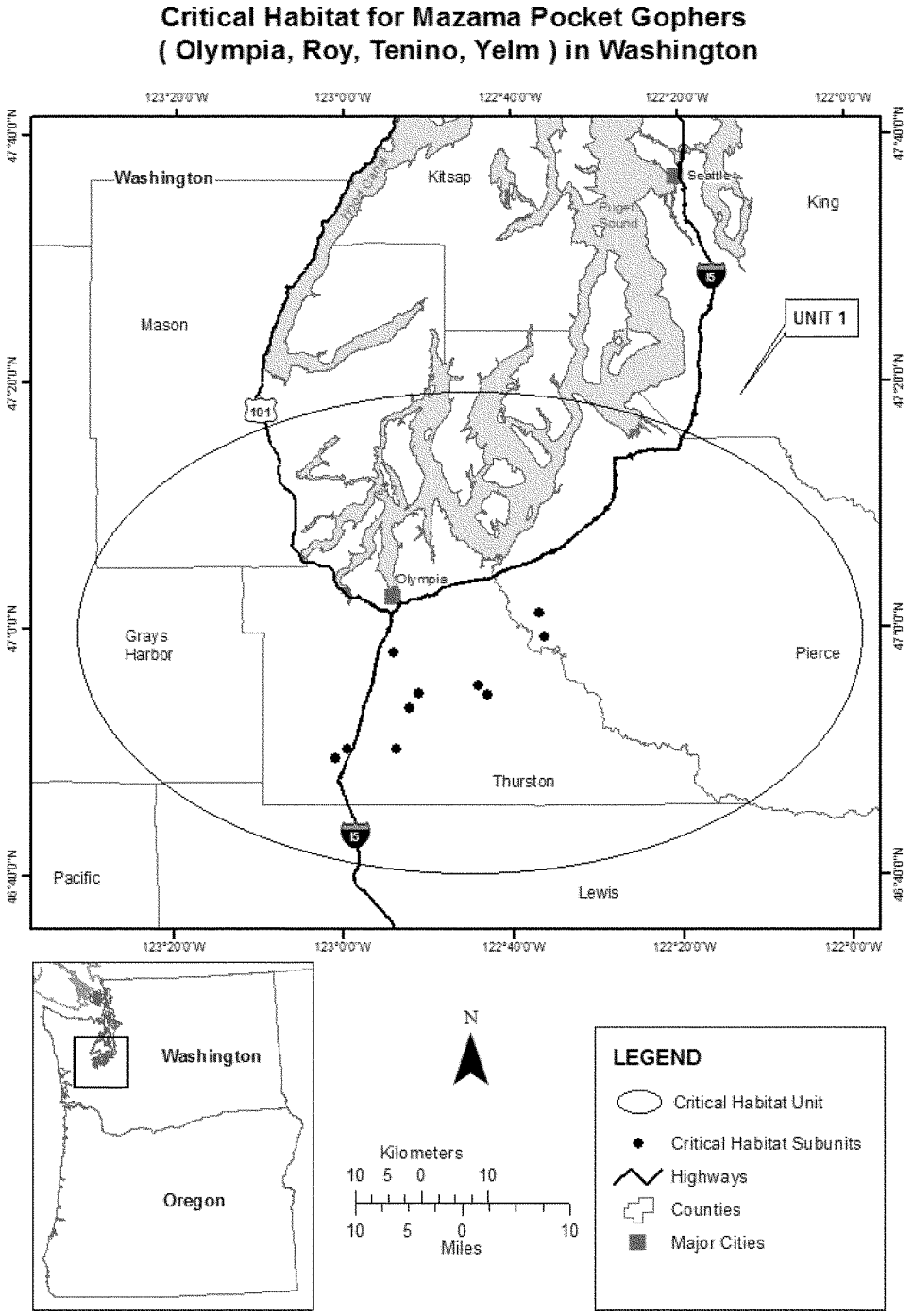
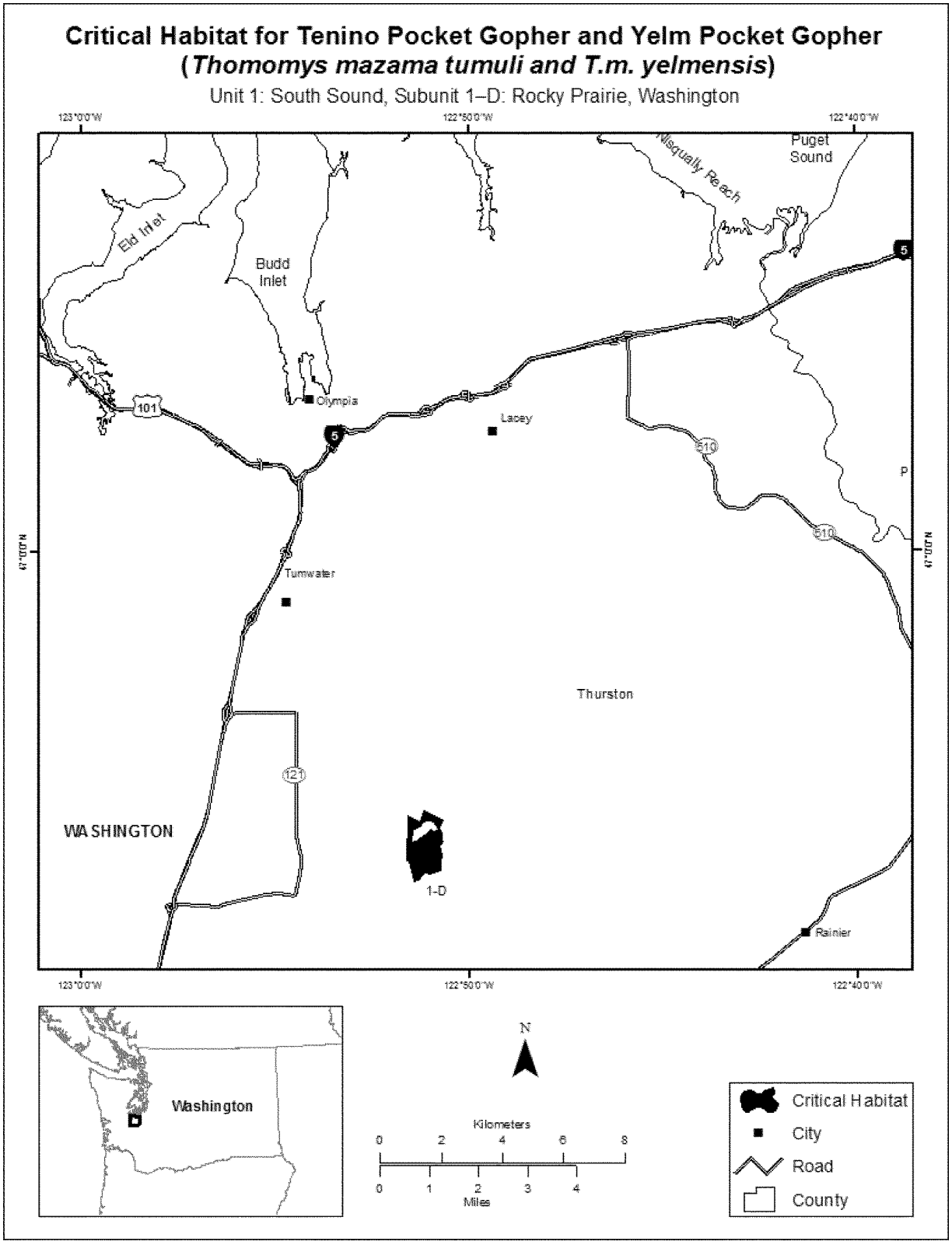


(6) Unit 1—South Sound. Subunit 1–D: Rocky Prairie, Thurston County, Washington. Map of Unit 1, Subunit 1–D follows:



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Yelm Pocket Gopher (*Thomomys mazama yelmensis*)

(1) Critical habitat units are depicted for Thurston and Pierce Counties in Washington on the maps below.

(2) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of the Yelm pocket gopher consist of two components:

(i) Friable, loamy, and deep soils, some with relatively greater content of sand, gravel, or silt, all generally on slopes less than 15 percent in the following series:

(A) Alderwood;
(B) Everett;
(C) Godfrey;
(D) Kapowsin;
(E) McKenna;
(F) Nisqually;
(G) Norma;
(H) Spana;
(I) Spanaway;
(J) Spanaway-Nisqually complex; and
(K) Yelm.

(ii) Areas equal to or larger than 50 ac (20 ha) in size that provide for breeding, foraging, and dispersal activities, found in the soil series listed in paragraph (2)(i) of this entry that have:

(A) Less than 10 percent woody vegetation cover.

(B)Vegetative cover suitable for foraging by gophers. Pocket gophers' diets include a wide variety of plant material, including leafy vegetation, succulent roots, shoots, tubers, and grasses. Forbs and grasses that Mazama pocket gophers are known to eat include, but are not limited to: *Achillea millefolium* (common yarrow), *Agoseris* spp. (agoseris), *Cirsium* spp. (thistle), *Bromus* spp. (brome), *Camassia* spp. (camas), *Collomia linearis* (tiny trumpet), *Epilobium spp.* (several willowherb spp.), *Eriophyllum lanatum* (woolly sunflower), *Gayophytum diffusum* (groundsmoke), *Hypochaeris radicata* (hairy cat's ear), *Lathyrus* spp. (peavine), *Lupinus* spp. (lupine), *Microsteris gracilis* (slender phlox), *Penstemon* spp. (penstemon), *Perideridia gairdneri* (Gairdner's yampah), *Phacelia heterophylla* (varileaf phacelia), *Polygonum douglasii* (knotweed), *Potentilla* spp. (cinquefoil), *Pteridium aquilinum* (bracken fern), *Taraxacum officinale* (common dandelion), *Trifolium* spp. (clover), and *Viola* spp. (violet).

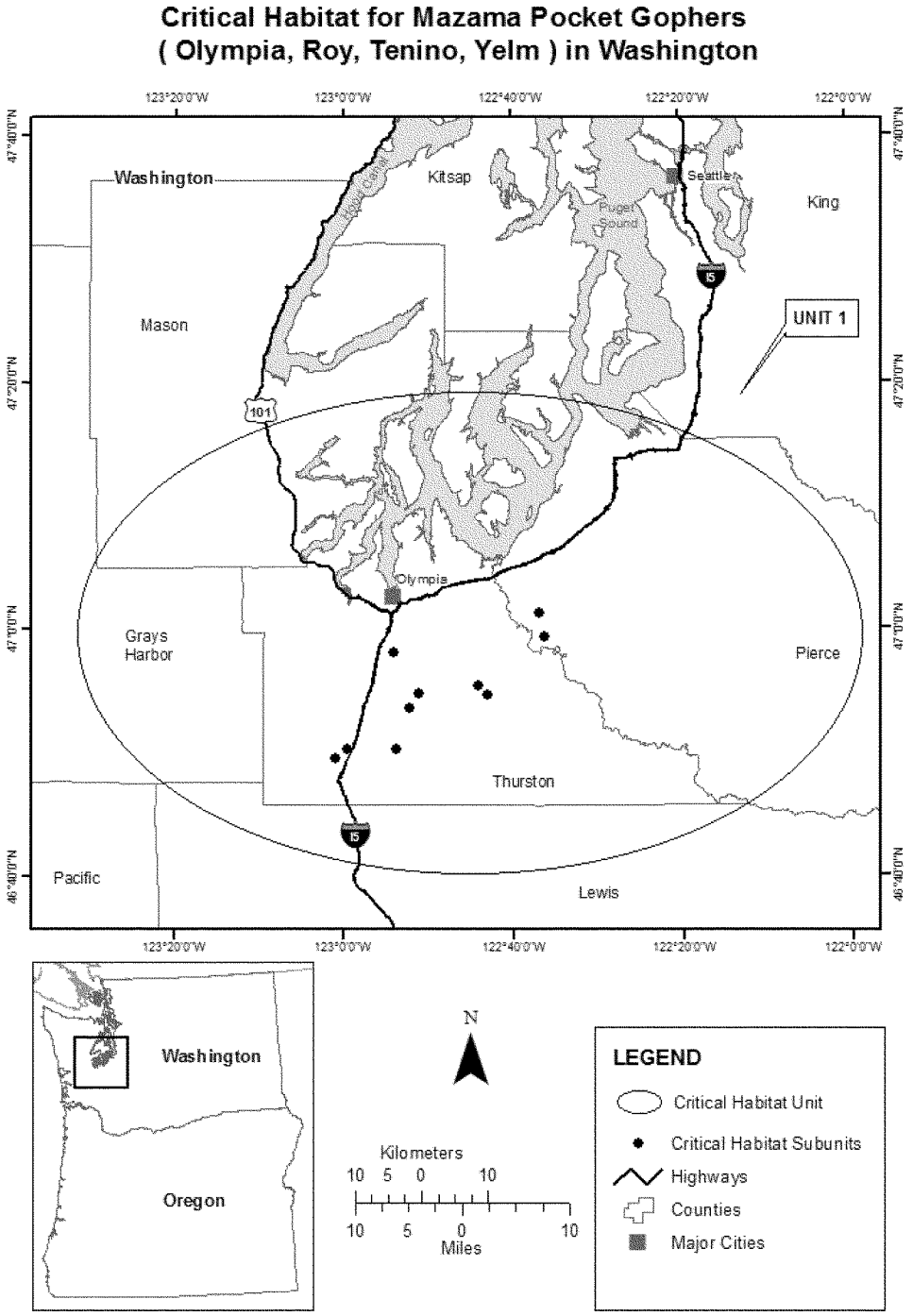
(C) Few, if any, barriers to dispersal. Barriers to dispersal include, but are not limited to: open water; steep slopes (greater than 35 percent); wide expanses of rhizomatous grasses; concrete; large areas of rock; development and buildings; and soils or substrates inappropriate for burrowing.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on [DATE 30 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE].

(4) *Critical habitat map units.* Data layers defining the map unit were created on 2010 aerial photography from U.S. Department of Agriculture, National Agriculture Imagery Program base maps using ArcMap (Environmental Systems Research Institute, Inc.), a computer geographic information system (GIS) program. The maps in this entry establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's internet site, (*http://www.fws.gov/wafwo/*), Regulations.gov (*http://www.regulations.gov* at Docket No. FWS–R1–ES–2012–0088), and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) **Note**: Index map follows:

BILLING CODE 4310–55–P



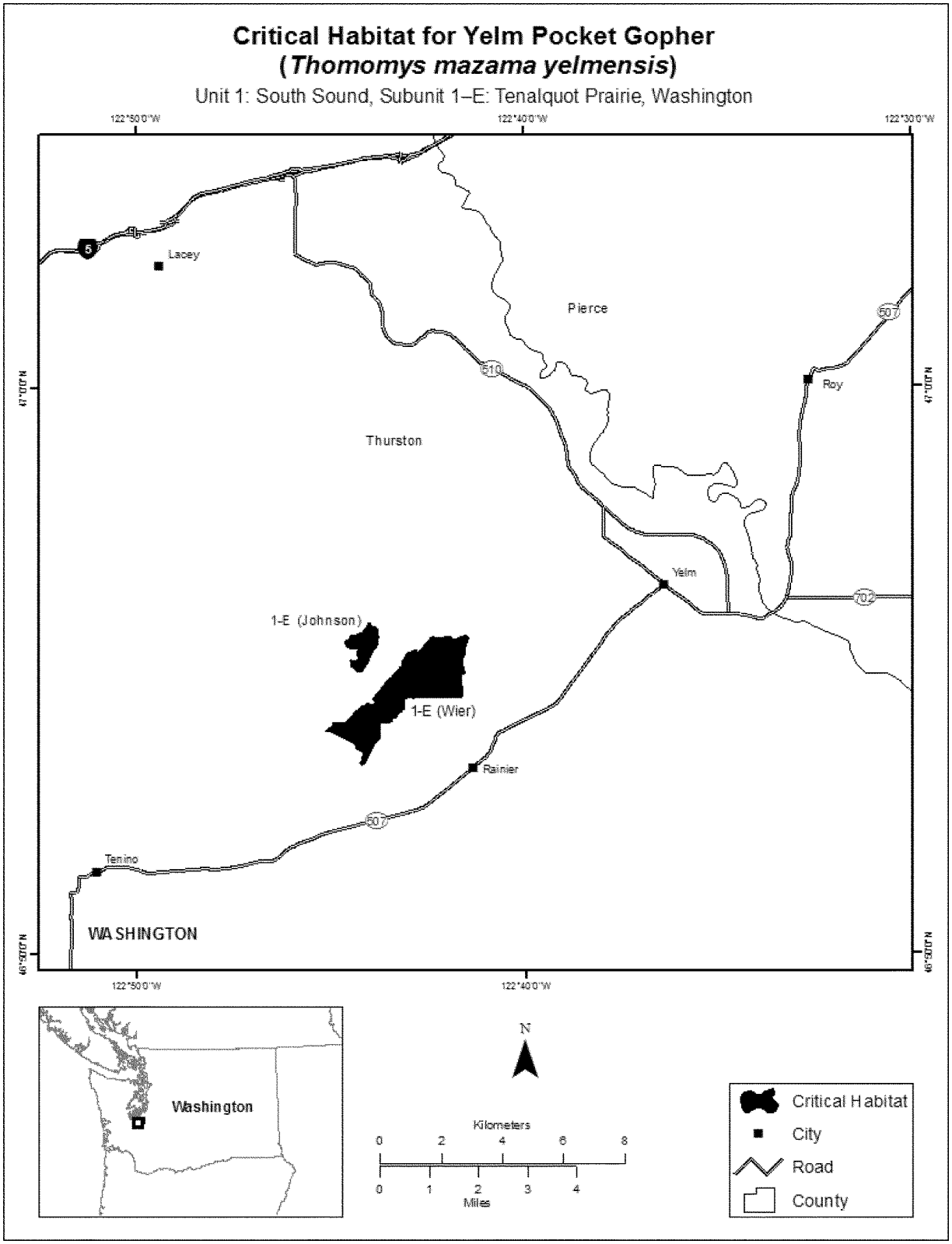
(6) Unit 1—South Sound, Subunit 1–A: 91 St Division Prairie, Pierce County, Washington. Map of Unit 1, Subunit 1–A is provided at paragraph (6) of the entry for the Roy Prairie pocket gopher.

(7) Unit 1—South Sound, Subunit 1–B: Marion Prairie, Pierce County, Washington. Map of Unit 1, Subunit 1–B, is provided at paragraph (7) of the entry for the Roy Prairie pocket gopher.

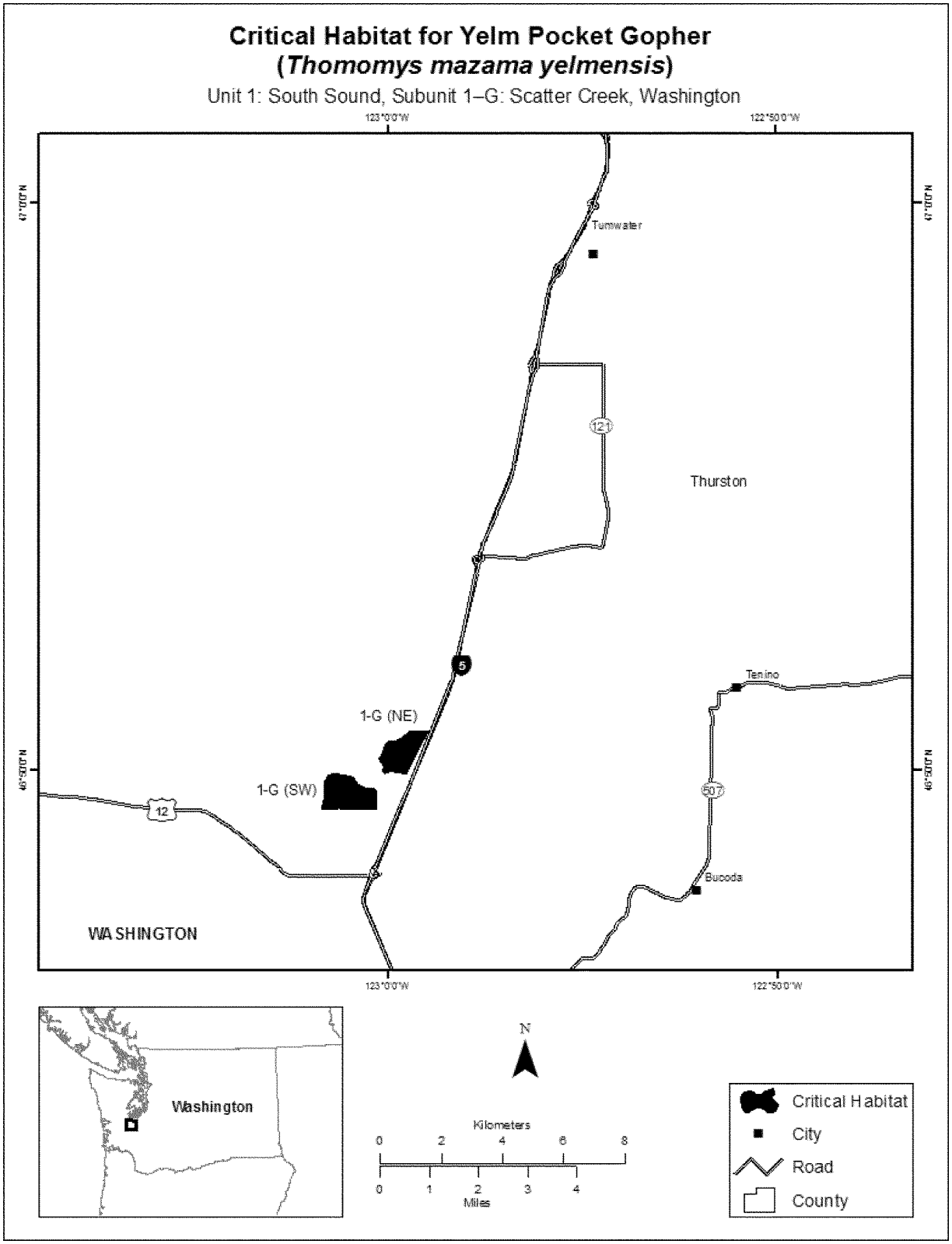
(8) Unit 1—South Sound, Subunit 1–C: Olympia Airport, Thurston County, Washington. Map of Unit 1, Subunit 1–C is provided at paragraph (6) of the entry for the Olympia pocket gopher.

(9) Unit 1—South Sound, Subunit 1–D: West Rocky Prairie, Thurston County, Washington. Map of Unit 1, Subunit 1–D is provided at paragraph (6) of the entry for the Tenino pocket gopher.

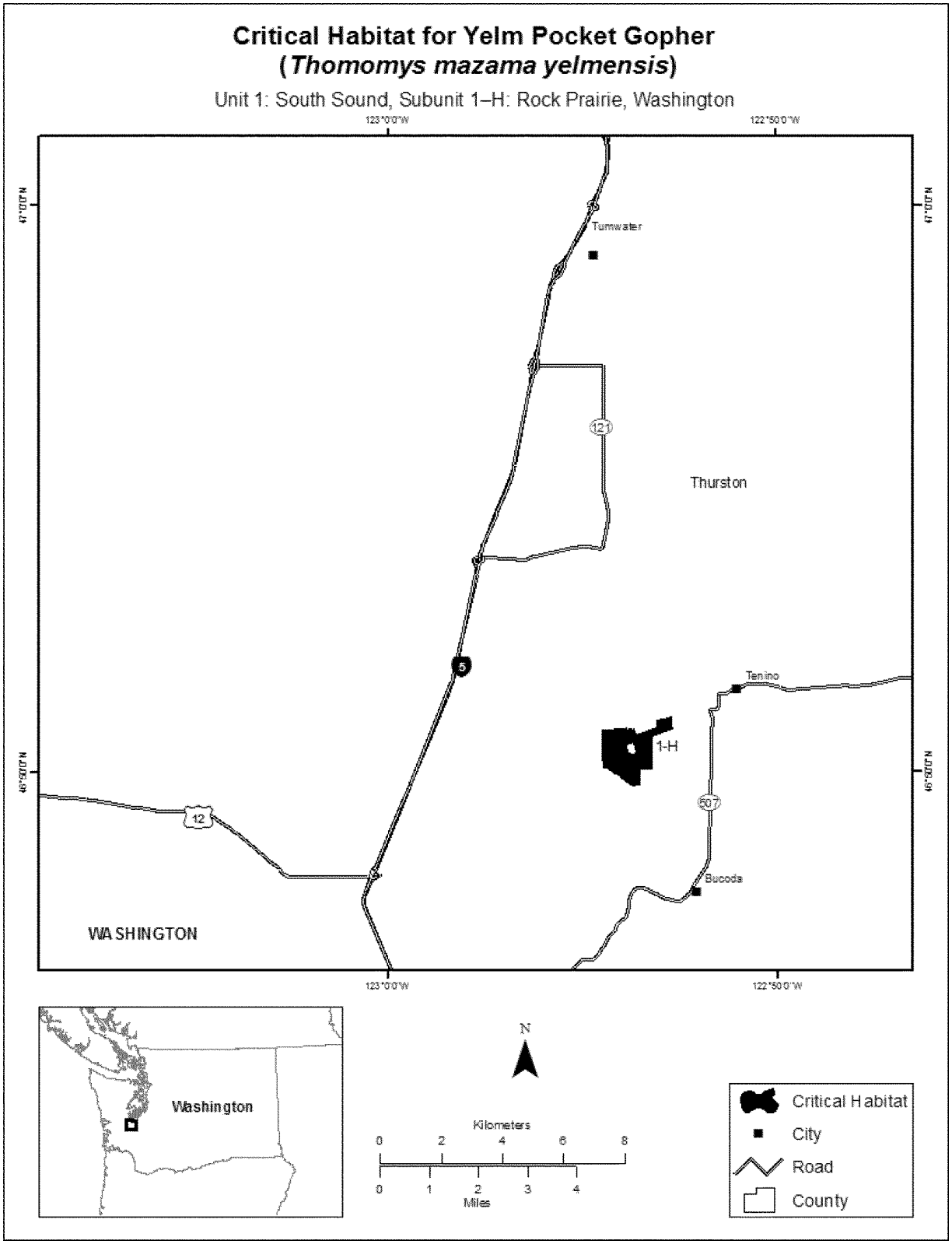
(10) Unit 1—South Sound, Subunit 1–E: Tenalquot Prairie, Thurston County, Washington. Map of Unit 1, Subunit 1–E follows:



(11) Unit 1—South Sound, Subunit 1–G: Scatter Creek, Thurston County, Washington. Map of Unit 1, Subunit 1–G follows:



(12) Unit 1—South Sound, Subunit 1–H: Rock Prairie, Thurston County, Washington. Map of Unit 1, Subunit 1–H follows:



* * * * *

Dated: November 27, 2012.

Rachel Jacobson,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2012–29335 Filed 12–10–12; 8:45 am]

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FEDERAL REGISTER

Vol. 77 Tuesday,
No. 238 December 11, 2012

Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Listing the Lesser Prairie-Chicken as a Threatened Species; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2012–0071: 4500030113]

RIN 1018–AV21

Endangered and Threatened Wildlife and Plants; Listing the Lesser Prairie-Chicken as a Threatened Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, propose to list the lesser prairie-chicken (*Tympanuchus pallidicinctus*), a grassland bird known from southeastern Colorado, western Kansas, eastern New Mexico, western Oklahoma, and the Texas Panhandle, as a threatened species under the Endangered Species Act of 1973, as amended (Act). If we finalize the rule as proposed, it would extend the Act's protection to this species. We have determined that designation of critical habitat for the lesser prairie-chicken under the Act is prudent but not determinable at this time. We are seeking information and comments from the public regarding the lesser prairie-chicken and this proposed rule.

DATES: We will accept comments received or postmarked on or before March 11, 2013. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** section, below) must be received by 11:59 p.m. Eastern Time on the closing date.

Public Hearings: We will hold four public hearings on this proposed rule. The public hearings will be held in Woodward, Oklahoma, on Tuesday, February 5; Garden City, Kansas, on Thursday, February 7; Lubbock, Texas, on Monday, February 11; and Roswell, New Mexico, on Tuesday, February 12. The public hearings will be held from 6:30 p.m. to 8:30 p.m.

ADDRESSES: *Document availability:* You may obtain copies of the proposed rule on the Internet at *http://www.regulations.gov* at Docket No. FWS–R2–ES–2012–0071 or by mail from the Oklahoma Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Written Comments: You may submit written comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* Search for Docket No. FWS–R2–ES–2012–0071. You may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R2–ES–2012–0071; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Information Requested section below for more information).

Public hearings: The public hearings will be held at the following locations:

(1) Woodward, Oklahoma: High Plains Technology Center Seminar Center, 3921 34th Street, Woodward, OK 73801.

(2) Garden City, Kansas: Garden City Community College, 801 N. Campus Drive, Garden City, KS 67846.

(3) Lubbock, Texas: Lubbock Civic Center, 1501 Mac Davis Lane, Lubbock, TX 79401.

(4) Roswell, New Mexico: Eastern New Mexico University Fine Arts Auditorium, 64 University Boulevard, Roswell, NM 88203.

People needing reasonable accommodations in order to attend and participate in the public hearing should contact Dixie Porter, Field Supervisor, Oklahoma Ecological Services Field Office, as soon as possible (see **FOR FURTHER INFORMATION CONTACT** below).

FOR FURTHER INFORMATION CONTACT: Dixie Porter, Field Supervisor, Oklahoma Ecological Services Field Office, 9014 East 21st Street, Tulsa, OK 74129; by telephone 918–581–7458 or by facsimile 918–581–7467. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

This document consists of: (1) A proposed rule to list the lesser prairie-chicken as a threatened species; and (2) a finding that critical habitat is prudent but not determinable at this time.

Why we need to publish a rule. Under the Endangered Species Act, a species may warrant protection through listing if it is an endangered or threatened species throughout all or a significant portion of its range. In this proposal, we are explaining why the lesser prairie-chicken warrants protection under the Endangered Species Act. This rule proposes to list the lesser prairie-chicken as a threatened species throughout its range.

The Endangered Species Act provides the basis for our action. Under the Endangered Species Act, we can determine that a species is an endangered or threatened species based on any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. The primary factors supporting the proposed threatened status for lesser prairie-chicken are the historical, ongoing, and probable future impacts of cumulative habitat loss and fragmentation. These impacts are the result of: conversion of grasslands to agricultural uses; encroachment by invasive woody plants; wind energy development; petroleum production; and presence of roads and manmade vertical structures including towers, utility lines, fences, turbines, wells, and buildings.

We will request peer review of the methods used in our proposal. We will specifically request that several knowledgeable individuals with scientific expertise in this species or related fields review the scientific information and methods that we used in developing this proposal.

We are seeking public comment on this proposed rule. Anyone is welcome to comment on our proposal or provide additional information on the proposal that we can use in making a final determination on the status of this species. Please submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. Within 1 year following the publication of this proposal, we will publish in the **Federal Register** a final determination concerning the listing of the species or withdraw the proposal if new information is provided that supports that decision.

Public Comments

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other concerned governmental agencies, Native American tribes, the scientific community, industry, general public, or any other interested parties concerning

this proposed rule. We particularly seek comments regarding:

(1) The historical and current status and distribution of the lesser prairie-chicken, its biology and ecology, specific threats (or lack thereof) and regulations that may be addressing those threats and ongoing conservation measures for the species and its habitat.

(2) Information relevant to the factors that are the basis for making a listing determination for a species under section 4(a) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), which are:

(a) The present or threatened destruction, modification, or curtailment of the species' habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting its continued existence and threats to the species or its habitat.

(3) Which areas would be appropriate as critical habitat for the species and why areas should or should not be proposed for designation as critical habitat, including whether there are threats to the species from human activity that would be expected to increase due to the designation and whether that increase in threat would outweigh the benefit of designation such that the designation of critical habitat may not be prudent.

(4) Specific information on:

- The amount and distribution of habitat for the lesser prairie-chicken,
- What may constitute ''physical or biological features essential to the conservation of the species,'' within the geographical range currently occupied by the species,
- Where these features are currently found,
- Whether any of these features may require special management considerations or protection,
- What areas, that were occupied at the time of listing (or are currently occupied) and that contain features essential to the conservation of the species, should be included in the designation and why,
- What areas not occupied at the time of listing are essential for the conservation of the species and why.

(5) Information on the projected and reasonably likely impacts of climate change on the lesser prairie-chicken and its habitat.

(6) Information as to which prohibitions, and exceptions to those prohibitions, are necessary and advisable to provide for the conservation of the lesser prairie-chicken pursuant to section 4(d) of the Act.

Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or threatened species must be made ''solely on the basis of the best scientific and commercial data available.''

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section.

If you submit a comment via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov.* Please include sufficient information with your comments to allow us to verify any scientific or commercial information you include.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov* at Docket No. FWS–R2–ES–2012–0071, or by appointment during normal business hours at the Oklahoma Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

On October 6, 1995, we received a petition, dated October 5, 1995, from the Biodiversity Legal Foundation, Boulder, Colorado, and Marie E. Morrissey (petitioners). The petitioners requested that we list the lesser prairie-chicken as threatened throughout its known historical range in the United States. The petitioners defined the historical range to encompass west-central Texas north through eastern New Mexico and western Oklahoma to southeastern Colorado and western Kansas and stated that there may have been small populations in northeastern Colorado and northwestern Nebraska. The petitioners also requested that critical habitat be designated as soon as the needs of the species are sufficiently well known. However, from October 1995 through April 1996, we were under a moratorium on listing actions as a result of Public Law 104–6, which, along with a series of continuing budget resolutions, eliminated or severely reduced our listing budget through April 1996. We were unable to act on the petition during that period. On July 8, 1997 (62 FR 36482), we announced our 90-day finding that the petition presented substantial information indicating that the petitioned action may be warranted. In that notice, we requested additional information on the status, trend, distribution, and habitat requirements of the species for use in conducting a status review. We requested that information be submitted to us by September 8, 1997. In response to a September 3, 1997, request by the Lesser Prairie-Chicken Interstate Working Group, we reopened the comment period for an additional 30 days beginning on November 3, 1997 (62 FR 59334). We subsequently published our 12-month finding for the lesser prairie-chicken on June 9, 1998 (63 FR 31400), concluding that the petitioned action was warranted but precluded by other higher priority listing actions.

On October 25, 1999, we published our combined plant and animal candidate notice of review, which initially identified the lesser prairie-chicken as a candidate for listing with a listing priority number (LPN) of 8 (64 FR 57534). Our policy (48 FR 43098; September 21, 1983) requires the assignment of an LPN to all candidate species. This listing priority system was developed to ensure that we have a rational system for allocating limited resources in a way that ensures those species in greatest need of protection are the first to receive such protection. The listing priority system considers magnitude of threat, immediacy of threat, and taxonomic distinctiveness in assigning species numerical listing priorities on a scale from 1 to 12. In general, a smaller LPN reflects a greater need for protection than a larger LPN. The lesser prairie-chicken was assigned an LPN of 8 indicating that the magnitude of threats was moderate and the immediacy of the threats to the species was high.

On January 8, 2001 (66 FR 1295), we published our resubmitted petition findings for 25 animal species, including the lesser prairie-chicken, having outstanding ''warranted-but-precluded'' petition findings as well as notice of one candidate removal. The lesser prairie-chicken remained a candidate with an LPN of 8 in our October 30, 2001 (66 FR 54808); June 13, 2002 (67 FR 40657); May 4, 2004 (69

FR 24876); May 11, 2005 (70 FR 24870); September 12, 2006 (71 FR 53755); and December 6, 2007 (72 FR 69033) Candidate Notices of Review. In our December 10, 2008 (73 FR 75176), candidate notice of review, we changed the LPN for the lesser prairie-chicken from an 8 to a 2. This change in LPN reflected a change in the magnitude of the threats from moderate to high primarily due to an anticipated increase in the development of wind energy and associated placement of transmission lines throughout the estimated occupied range of the lesser prairie-chicken. Our June 9, 1998, 12-month finding (63 FR 31400) did not recognize wind energy and transmission line development as a threat because such development within the known range was almost nonexistent at that time. Changes in the magnitude of other threats, such as conversion of certain Conservation Reserve Program (CRP) lands from native grass cover to cropland or other less ecologically valuable habitat and observed increases in oil and gas development, also were important considerations in our decision to change the LPN. The immediacy of the threats to the species did not change and continued to be high. Our November 9, 2009 (74 FR 57804), November 10, 2010 (75 FR 69222), and October 26, 2011 (76 FR 66370) Candidate Notices of Review retained an LPN of 2 for the lesser prairie-chicken.

Since making our 12-month finding, we have received several 60-day notices of intent to sue from WildEarth Guardians (then Forest Guardians) and several other parties for failure to make expeditious progress toward listing of the lesser prairie-chicken. These notices were dated August 13, 2001; July 23, 2003; November 23, 2004; and May 11, 2010. WildEarth Guardians subsequently filed suit on September 1, 2010, in the U.S. District Court for the District of Colorado. A revised notice of intent to sue dated January 24, 2011, in response to motions from New Mexico Oil and Gas Association, New Mexico Cattle Growers Association, and Independent Petroleum Association of New Mexico to intervene on behalf of the Secretary of Interior, also was received from WildEarth Guardians.

This complaint was subsequently consolidated in the U.S. District Court for the District of Columbia along with several other cases filed by the Center for Biological Diversity or WildEarth Guardians relating to petition finding deadlines and expeditious progress toward listing. A settlement agreement in *In re Endangered Species Act Section 4 Deadline Litigation,* No. 10–377 (EGS), MDL Docket No. 2165 (D.D.C. May 10, 2011) was reached with WildEarth Guardians in which we agreed to submit a proposed listing rule for the lesser prairie-chicken to the **Federal Register** for publication by September 30, 2012.

Summary of Recent and Ongoing Conservation Actions

Numerous conservation actions have been implemented within the historical range of the lesser prairie-chicken, many focused primarily on the currently occupied portion of the range, during the last 10 to 15 years. The State conservation agencies have taken a lead role in implementation of these actions, but several Federal agencies and private conservation organizations have played an important supporting role in many of these efforts. Recently, several multi-State efforts have been initiated, and the following section briefly discusses many of the known conservation efforts for the lesser prairie-chicken.

Multi-State Conservation Efforts

The CRP administered by the U.S. Department of Agriculture's (USDA) Farm Services Agency and targeted at agricultural landowners has provided short-term protection and enhancement of millions of acres within the range of the lesser prairie-chicken. The CRP is a voluntary program that allows eligible landowners to receive annual rental payments and cost-share assistance to remove land from agricultural production and establish vegetative cover for the term of the contract. Contract terms are for 10 to 15 years, and the amount and dispersion of land enrolled in CRP fluctuates as contracts expire and new lands are enrolled. All five States within the range of the lesser prairie-chicken have lands enrolled in CRP. Many of the States, with the exception of Kansas, initially used nonnative grasses as the predominant cover type established on enrolled lands. Kansas chose to use native species of grasses as the cover type for many of their enrolled lands, resulting in a considerable benefit to lesser prairie-chicken conservation. As the program has evolved since its inception in 1985, use of native grasses as the predominant cover type has been encouraged, resulting in even greater benefit for lesser prairie-chickens. Use of native grasses in the CRP helps create suitable nesting and brood rearing habitat for the lesser prairie-chicken.

The State Acres For Wildlife Enhancement program (SAFE) is a conservation practice utilized under CRP to benefit high-priority species including the lesser prairie-chicken. Beginning in 2008, the SAFE program was implemented in Colorado, Kansas, New Mexico, Oklahoma, and Texas to target grassland habitat improvement measures within the range of the lesser prairie-chicken. These measures help improve suitability of existing grasslands for nesting and brood rearing by lesser prairie-chickens. In accordance with CRP guidelines, crop producers can voluntarily enroll eligible lands in 10- to 15-year contracts in exchange for payments, incentives, and cost-share assistance to establish natural vegetation on enrolled lands. Areas allocated for the SAFE program vary by State and are as follows: Colorado 8,700 hectares (ha) (21,500 acres (ac)); Kansas 12,141 (30,000 ac); New Mexico 1,052 ha (2,600 ac); Oklahoma 6,111 ha (15,100 ac); and Texas 31,727 (78,400 ac). Total potential enrollment in SAFE program is 59,731 ha (147,600 ac) or about 1 percent of the current estimated occupied range. The current status of the SAFE program, organized by State, is provided in the sections that follow.

In 2011, the USDA Natural Resources Conservation Service (NRCS) began implementation of the Lesser Prairie Chicken Initiative. The Lesser Prairie Chicken Initiative provides conservation assistance, both technical and financial, to landowners throughout the Lesser Prairie Chicken Initiative's administrative boundary. The NRCS has partnered with other stakeholders to fund, through the Strategic Watershed Action Teams program, additional staff positions dedicated to providing accelerated and targeted technical assistance to landowners within the current range of the lesser prairie-chicken. Technical assistance is voluntary help provided by NRCS that is intended to assist non-federal land users in addressing opportunities, concerns, and problems related to the use of natural resources and to help land users make sound natural resource management decisions on private, tribal, and other non-federal land. This assistance may be in the form of resource assessment, practice design, resource monitoring, or follow-up of installed practices. The Lesser Prairie Chicken Initiative focuses on maintenance and enhancement of suitable habitat while benefiting agricultural producers by maintaining the farming and ranching operations throughout the region. Numerous partners are involved in this multi-state initiative including the State conservation agencies, the Playa Lakes Joint Venture, and the Wood Foundation. The Environmental Quality Incentives Program (EQIP) and the Wildlife Habitat Incentives Program (WHIP) are the primary programs used

to provide for conservation through the Lesser Prairie Chicken Initiative. The EQIP is a voluntary program that provides financial and technical assistance to agricultural producers through contracts up to a maximum term of 10 years in length. These contracts provide financial assistance to help plan and implement conservation practices that address natural resource concerns and opportunities to improve soil, water, plant, animal, air, and related resources on agricultural land. Similarly, the WHIP is a voluntary program designed for conservation-minded landowners who want to develop and improve wildlife habitat on agricultural land, including tribal lands. Through WHIP, NRCS may provide both technical assistance and up to 75 percent cost-share assistance to establish and improve fish and wildlife habitat. Cost-share agreements between NRCS and the landowner may extend up to 10 years from the date the agreement is signed. Through these two programs, NRCS has committed some $17.5 million to the Lesser Prairie Chicken Initiative in Texas alone. In 2010, the identified funds were allocated throughout the historical range, with some 33,956 ha (83,907 ac) placed under contract within those counties that intersected the estimated occupied range. By entering into a contract with NRCS, the landowner agrees to implement specified conservation actions through provisions of the applicable Farm Bill conservation program, such as WHIP or EQIP. Another 32,139 ha (79,417 ac) were allocated to contracts on lands outside of the estimated occupied range but within unoccupied portions of the historical range. In 2011, efforts were undertaken to more precisely apply the funds to areas within the estimated occupied range.

The North American Grouse Partnership, in cooperation with the National Fish and Wildlife Foundation and multiple State conservation agencies and private foundations, have embarked on the preparation of the prairie grouse portions of an overarching North American Grouse Management Strategy. The Prairie Grouse Conservation Plan, which was completed in 2008 (Vodehnal and Haufler 2008, entire), provides recovery actions and defines the levels of funding necessary to achieve management goals for all species of prairie grouse in North America. The prairie grouse portions of this strategy encompass some 26 million ha (65 million ac) of grassland habitat in the United States and Canada.

The Lesser Prairie-Chicken Interstate Working Group was formed in 1996. This group, composed largely of State agency biologists under the oversight of the Western Association of Fish and Wildlife Agencies' Grassland Coordinator, meets annually to share information on the status of the lesser prairie-chicken, results of new research, and ongoing threats to the species. The Working Group has played an important role in defining and implementing conservation efforts for the lesser prairie-chicken. In 1999, they published a conservation strategy for the lesser prairie-chicken (Mote *et al.* 1999, entire). Then, in 2008, the Working Group published a lesser prairie-chicken conservation initiative (Davis *et al.* 2008, entire).

Since 2004, the Sutton Center has been working to reduce or eliminate the mortality of lesser prairie-chickens due to fence collisions on their study areas in Oklahoma and Texas. Forceful collisions with fences during flight can cause direct mortality of lesser prairie-chickens (Wolfe *et al.* 2007, pp. 96–97, 101). However, mortality risk appears to be dependent on factors such as fencing design (height, type, number of strands), length, and density, as well as landscape topography and proximity of fences to habitats used by lesser prairie-chickens. The Sutton Center has used competitive grants and other funding sources to either physically remove unnecessary fencing or to apply markers of their own design (Wolfe *et al.* 2009, entire) to the top two strands to increase visibility of existing fences. To date, approximately 335 kilometers (km) (208 miles (mi)) of barbed-wire fence in Oklahoma and Texas have been treated. Treatments are typically concentrated within 1.6 km (1 mi) of active lesser prairie-chicken leks. Approximately 208 km (129 mi) of unneeded fences have been removed. Collectively, these conservation activities have the potential to significantly reduce the threat of collision mortality on 44,110 ha (109,000 ac) of occupied habitat. Our Partners for Fish and Wildlife Program (PFW) initiated a similar fence marking effort in New Mexico during 2008. Although the amount of marked fences has not been quantified, the effort is an important contribution to ongoing conservation efforts. However, continued fence construction throughout the range of the lesser prairie-chicken and the localized influence of these conservation efforts likely limits the effectiveness of such measures at the population level.

The Service and the five State conservation agencies are currently working with 19 wind energy development companies to develop a programmatic Habitat Conservation Plan (HCP) for several species, including the lesser prairie-chicken. An HCP is a planning document required as part of an application for a permit for incidental take of a Federally listed species. The HCP describes the anticipated effects of the proposed taking; how those impacts will be minimized or mitigated; and how the HCP is to be funded. The Oklahoma Department of Wildlife Conservation (ODWC) received a nontraditional section 6 HCP planning grant that is supporting this effort. The HCP is scheduled to be finalized in the spring of 2014. We anticipate the conservation program of the HCP could involve acquisition and setting aside of conservation or mitigation lands.

Recently the five State conservation agencies developed an Internet-based mapping tool as a pilot project under the Western Governors' Association Wildlife Council. This tool, known as the Southern Great Plains Crucial Habitat Assessment Tool (CHAT), was made accessible to the public in September 2011. The CHAT is available for use by conservation managers, industry, and the public to aid in conservation planning for the lesser prairie-chicken. The tool identifies priority habitat for the lesser prairie-chicken including possible habitat corridors linking important conservation areas. The CHAT classifies areas on a scale of 1 to 5 by their relative value as lesser prairie-chicken habitat. The most important category is identified as ''irreplaceable'' and is indicative of areas that are rare or fragile and considered essential to achieving and maintaining population viability. The lowest category is considered ''common'' and represents areas that are relatively common and generally less limiting to lesser prairie-chicken populations or metapopulations. These areas are generally better suited for development uses. The CHAT includes other data layers that may facilitate conservation planning, including current and historical lesser prairie-chicken range, land cover types, oil and gas well density, presence of vertical structures, and hexagonal summary polygon to provide users contextual information about the surrounding landscape. A revision of the CHAT is planned in the coming months, and the tool will be updated annually. Use of the tool is currently voluntary but ultimately may play an important role in guiding future development and conserving important habitats.

Candidate Conservation Agreements (CCAs) and Candidate Conservation Agreements with Assurances (CCAAs) are formal, voluntary agreements

between the Service and one or more parties to address the conservation needs of one more candidate species or species likely to become candidates in the near future. These agreements are intended to reduce or remove identified threats to a species. Implementing conservation efforts before species are listed increases the likelihood that simpler, more cost-effective conservation options are available and that conservation efforts will succeed. Development of CCAs and CCAAs is guided by regulations at 50 CFR 17.22(d) and 50 CFR 17.32(d).

Under a CCA, Federal managers and other cooperators (non-governmental organizations and lease holders) implement conservation measures that reduce threats on Federal lands and leases. Under a CCAA, non-Federal landowners and lease holders voluntarily provide habitat protection or enhancement measures on their lands, thereby reducing threats to the species. A section 10(a)(1)(A) Enhancement of Survival Permit is issued in association with a CCAA. If the species is later listed under the Act, the permit authorizes take that is incidental to otherwise lawful activities specified in the agreement, when performed in accordance with the terms of the agreement. Further, the CCAA provides assurances that if the subject species is later listed under the Act, participants who are appropriately implementing certain conservation actions under the CCAA will not be required to implement additional conservation measures.

The lesser prairie-chicken is covered by a CCA with the Bureau of Land Management (BLM) and two ''umbrella'' CCAAs, one each in Texas and New Mexico. A draft umbrella CCAA for Oklahoma was made available for public review and comment on June 25, 2012 (77 FR 37917). An additional CCAA has been established with a single landowner in southwestern Kansas; however, this CCAA has since expired. Under these agreements, the participants agree to implement certain conservation measures that are anticipated to reduce threats to lesser prairie-chicken and improve their population stability, through increases in adult and juvenile survivorship, nest success, and recruitment rates and reduced mortality. Dependent upon the level of participation, expansion of the occupied range may occur. Conservation measures typically focus on maintenance, enhancement, or restoration of nesting and brood rearing habitat. Some possible conservation measures include removal of invasive woody plants such as mesquite and eastern red cedar, implementation of prescribed fire, marking of fences, removal of unneeded fences, improved grazing management, and similar measures that help reduce the impact of the existing threats.

All of the State conservation agencies and many Federal agencies within the range of the lesser prairie-chicken conduct outreach efforts intended to inform and educate the public about the conservation status of the species. Many of these efforts specifically target landowners and other interested stakeholders involved in lesser prairie-chicken conservation. Annual festivals focused on the lesser prairie-chicken are held in several States (Milnesand, New Mexico; Woodward, Oklahoma; and Canadian, Texas) that help inform and raise awareness for the public. Often festival participants are able to visit an active lesser prairie-chicken breeding area to observe courtship displays.

Colorado

The Colorado Parks and Wildlife (CPW) hosted a workshop on the conservation of the lesser prairie-chicken in late 2009. This workshop provided information to local landowners and other interested parties on conservation of the lesser prairie-chicken. Specific management actions, such as grassland restoration and enhancement, intended to benefit conservation of the lesser prairie-chicken were highlighted.

The NRCS is using EQIP and WHIP to implement habitat improvement projects for the lesser prairie-chicken in Colorado. Colorado also has implemented a Habitat Improvement Program (HIP) for the lesser prairie-chicken that provides cost-sharing to private landowners, subject to prior consultation and approval from a CPW biologist, for enrolling fields or conducting habitat enhancements beneficial to the species. Approximately 2,250 ha (5,560 ac) have been enrolled in this program (Verquer and Smith 2011, p. 7). Additionally, Colorado has a Wildlife Habitat Protection Program designed to facilitate acquisition of conservation easements and purchase of lands for the lesser prairie-chicken. The lesser prairie-chicken is one of five priorities for 2012, and up to $14 million is available in the program.

Currently about 4,433 ha (10,954 ac) have been enrolled under the lesser prairie-chicken CRP SAFE continuous sign-up in Colorado. These enrolled areas are typically recently expired CRP lands and contain older grass stands in less than optimal habitat condition. In late winter 2010 or early spring 2011, one-third of these enrolled lands received a forb and legume inter-seeding consisting of dryland alfalfa and other species to improve habitat quality. This effort is anticipated to result in the establishment of alfalfa and additional forbs, resulting in improved nesting and brood-rearing habitat. Some 4,249 ha (10,500 ac) of the initial 8,701 ha (21,500 ac) allocated for SAFE remain to be enrolled. High interest by landowners indicates that these additional acres will be enrolled in the near future (Verquer and Smith 2011, p. 7).

Our Partners for Fish and Wildlife Program (PFW) program has contributed financial and technical assistance for restoration and enhancement activities benefitting the lesser prairie-chicken in Colorado. The PFW program has executed 14 private lands agreements facilitating habitat restoration and enhancement for the lesser prairie-chicken on about 9,307 ha (23,000 ac) of private lands in southeastern Colorado.

A cooperative project between the CPW and the U.S. Forest Service (USFS) has established several temporary grazing exclosures adjacent to active leks on the Comanche National Grassland in an attempt to improve nesting habitat. The efficacy of these treatments is unknown, and further monitoring is planned to determine the outcome of these efforts (Verquer and Smith 2011, p. 7).

In addition, more than 4,450 ha (11,000 ac) have been protected by perpetual conservation easements held by CPW, The Nature Conservancy, and the Greenlands Reserve Land Trust.

Kansas

The Kansas Department of Wildlife, Parks, and Tourism (KDWPT) has targeted lesser prairie-chicken habitat improvements through various means including the Landowner Incentive Program, voluntary mitigation projects for energy development, and a state-level WHIP. The Landowner Incentive Program improved some 9,118 ha (22,531 ac) for lesser prairie-chickens during the period from 2007 to 2011. Since 2008, the KDWPT has provided $64,836 in landowner cost-share through the WHIP for practices benefitting the lesser prairie-chicken on about 2,364 ha (5,844 ac). Currently more than 11,662 ha (28,819 ac) of the original allocation have been enrolled under the lesser prairie-chicken CRP SAFE continuous signup in Kansas. Primary practices include tree removal, prescribed fire, grazing management (including perimeter fencing), and native grass establishment that will improve lesser prairie-chicken nesting and brood rearing habitat.

Funds available through the state wildlife grants program also have been used to benefit the lesser prairie-chicken in Kansas. The KDWPT was awarded a 5-year state wildlife grant in 2009 focusing on lesser prairie-chicken habitat improvements. During the first funding cycle, a total of $181,127.34 was allocated to six projects encompassing some 1,484 ha (3,667 ac). During two subsequent application periods, nine more projects were funded at a cost of $180,584, targeting some 1,319 ha (3,260 ac).

Like several of the other States within the range of the lesser prairie-chicken, the KDWPT partnered with Pheasants Forever and NRCS to fund three employee positions that will provide technical assistance to private landowners participating in conservation programs with an emphasis on practices favorable to the lesser prairie-chicken. These employees will primarily assist in the implementation and delivery of the NRCS's Lesser Prairie Chicken Initiative in Kansas.

Additionally, KDWPT has a walk-in hunting program that was initiated in 1995 in an effort to enhance the hunting tradition in Kansas. The program provides hunters access to private property and has become one of the most successful access programs in the country. By 2004, more than 404,000 ha (1 million ac) have been enrolled in the program. Landowners receive a small payment in exchange for allowing public hunting access to enrolled lands. Payments vary by the amount of acres enrolled and length of contract period. Conservation officers monitor the areas, and violators are ticketed or arrested for offenses such as vandalism, littering, or failing to comply with hunting or fishing regulations.

The Service's PFW program has contributed financial and technical assistance for restoration and enhancement activities that benefit the lesser prairie-chicken in Kansas. Primary activities include control of invasive woody plant species like eastern red cedar and enhanced use of prescribed fire to improve habitat conditions in native grasslands. The PFW program has executed 54 private lands agreements on about 51,246 ha (126,878 ac) of private lands benefitting conservation of the lesser prairie-chicken in Kansas. An approved CCAA was developed on 1,133 ha (2,800 ac) in south-central Kansas; however, this CCAA has since expired.

New Mexico

In January 2003, a working group composed of local, state, and Federal officials, along with private and commercial stakeholders, was formed to address conservation and management activities for the lesser prairie-chicken and dunes sagebrush lizard (*Sceloporus arenicolus*) in New Mexico. This working group, formally named the New Mexico Lesser Prairie-Chicken/Sand Dune Lizard Working Group, published the Collaborative Conservation Strategies for the Lesser Prairie-Chicken and Sand Dune Lizard in New Mexico (Strategy) in August 2005. This Strategy provided guidance in the development of BLM's Special Status Species Resource Management Plan Amendment (RMPA), approved in April 2008, which also addressed the concerns and future management of lesser prairie-chicken and dunes sagebrush lizard habitats on BLM lands, and established the Lesser Prairie-Chicken Habitat Preservation Area of Critical Environmental Concern. Both the Strategy and the RMPA prescribe active cooperation among all stakeholders to reduce or eliminate threats to these species in New Mexico. As an outcome, the land-use prescriptions contained in the RMPA now serve as baseline mitigation (for both species) to those operating on Federal lands or non-Federal lands with Federal minerals.

Following approval of the RMPA, a CCA was drafted by a team including the Service, BLM, Center of Excellence for Hazardous Materials Management, and participating cooperators. The CCA addresses the conservation needs of the lesser prairie-chicken and dunes sagebrush lizard on BLM lands in New Mexico by undertaking habitat restoration and enhancement activities and minimizing habitat degradation. These efforts would protect and enhance existing populations and habitats, restore degraded habitat, create new habitat, augment existing populations of lesser prairie-chickens, restore populations, fund research studies, or undertake other activities on their Federal leases or allotments that improve the status of the lesser prairie-chicken. Through this CCA, Center of Excellence for Hazardous Materials Management will work with participating cooperators who voluntarily commit to implementing or funding specific conservation actions, such as burying powerlines, controlling mesquite, minimizing surface disturbances, marking fences, and improving grazing management, in an effort to reduce or eliminate threats to both species. The CCA builds upon the BLM's RMPA for southeast New Mexico. The RMPA established the foundational requirements that will be applied to all future Federal activities, regardless of whether a permittee or lessee participates in this CCA. The strength of the CCA comes from the implementation of additional conservation measures that are additive, or above and beyond those foundational requirements established in the RMPA. In addition to the CCA, a CCAA has been developed in association with the CCA to facilitate conservation actions for the lesser prairie-chicken and dunes sagebrush lizard on private and State lands in southeastern New Mexico.

Since the CCA and CCAA were finalized in December 2008, 29 oil and gas companies have enrolled a total of 330,180 ha (815,890 ac) of mineral holdings under the CCA. In addition, 39 private landowners in New Mexico have enrolled about 616,571 ha (1,523,573 ac). There currently are additional pending mineral and ranching enrollment applications being reviewed and processed for inclusion. Recently, BLM also has closed 149,910 ha (370,435 ac) to future oil and gas leasing and closed some 342,770 ha (847,000 ac) to wind and solar development. They have reclaimed 536 ha (1,325 ac) of abandoned well pads and associated roads and now require burial of powerlines within 3.2 km (2 mi) of leks. Some 52 km (32.5 mi) of aboveground powerlines have been removed to date. Additionally, BLM has implemented control efforts for mesquite (*Prosopis glandulosa*) on some 148,257 ha (366,350 ac) and has plans to do so on an additional 128,375 ha (317,220 ac). More discussion of mequite control is addressed in the ''Shrub Control and Eradication'' section below.

Acquisition of land for the protection of lesser prairie-chicken habitat also has occurred in New Mexico. The New Mexico Department of Game and Fish (NMDGF) currently has designated 29 areas specifically for management of the lesser prairie-chickens totaling more than 11,850 ha (29,282 ac). These areas are closed to the public during the breeding and nesting season (March 1 to July 30), each year and restrictions are in place to minimize noise and other activities associated with oil and gas drilling. In 2007, the State Game Commission used New Mexico State Land Conservation Appropriation funding to acquire 2,137 ha (5,285 ac) of private ranchland in Roosevelt County. This property, the Sandhills Prairie Conservation Area (formerly the Lewis Ranch), is located east of Milnesand, New Mexico, and adjoins two existing Commission-owned Prairie-Chicken Areas. The BLM, on March 3, 2010, also acquired 3,010 ha (7,440 ac) of land east of Roswell, New Mexico, to protect key

habitat for the lesser prairie-chicken. The Nature Conservancy owns and manages the 11,331-ha (28,000-ac) Milnesand Prairie Preserve near Milnesand, New Mexico.

The Service's PFW program also has been active in lesser prairie-chicken conservation efforts in the State of New Mexico. Private lands agreements have been executed on 65 properties encompassing some 28,492 ha (70,404 ac) of lesser prairie-chicken habitat in New Mexico. Additionally the entire 3,683 ha (2,600 ac) allotted to the lesser prairie-chicken CRP SAFE continuous signup in New Mexico has been enrolled in the program.

Oklahoma

The ODWC partnered with the Service, the Oklahoma Secretary of Environment, The Nature Conservancy, the Sutton Center, and the Playa Lakes Joint Venture to develop the Oklahoma Lesser Prairie-Chicken Spatial Planning Tool in 2009. The goal of the Oklahoma Lesser Prairie-Chicken Spatial Planning Tool is to reduce the impacts of ongoing and planned development actions within the range of the lesser prairie-chicken by guiding development away from sensitive habitats used by the species. The Oklahoma Lesser Prairie-Chicken Spatial Planning Tool assigns a relative value rank to geographic areas to indicate the value of the area to the conservation of the lesser prairie-chicken. The higher the rank (on a scale of 1 to 8), the more important the area is to the lesser prairie-chicken. The Oklahoma Lesser Prairie-Chicken Spatial Planning Tool, therefore, can be used to identify areas that provide high-quality habitat and determine where development, such as wind power, would have the least impact to the species. The Oklahoma Lesser Prairie-Chicken Spatial Planning Tool also can be used to determine a voluntary offset payment based on the cost of mitigating the impact of the anticipated development through habitat replacement. The voluntary offset payment is intended to be used to offset the impacts associated with habitat loss. Use of the Oklahoma Lesser Prairie-Chicken Spatial Planning Tool and the voluntary offset payment is voluntary.

To date, in excess of $11.1 million has been committed to the ODWC through the voluntary offset payment program. Most recently, the ODWC entered into a Memorandum of Agreement with Chermac Energy Corporation to partially offset potential habitat loss from a planned 88.5-km (55-mi) high-voltage transmission line. The line would run from near the Kansas State line to the Oklahoma Gas and Electric Woodward Extra High Voltage substation and will be used to carry up to 900 megawatts of wind energy from an existing wind farm in Harper County. The Memorandum of Agreement facilitates voluntary offset payments for impacts to the lesser prairie-chicken and their habitat. The agreement calls for the payment of a total of $2.5 million, with the money being used to help leverage additional matching funds from private and Federal entities for preservation, enhancement, and acquisition of lesser prairie-chicken habitat. A large percentage of the voluntary offset payment funds have been used to acquire lands for the conservation of the lesser prairie-chicken and other fish and wildlife resources.

In 2008, the ODWC acquired two properties known to be used by the lesser prairie-chicken. The Cimarron Bluff Wildlife Management Area encompasses 1,388 ha (3,430 ac) in northeastern Harper County, Oklahoma. The Cimarron Hills Wildlife Management Area in northwestern Woods County, Oklahoma, encompasses 1,526 ha (3,770 ac). The ODWC also recently purchased 5,580 ha (13,789 ac) within the range of the lesser prairie-chicken to expand both the Beaver River and Packsaddle Wildlife Management Areas in Beaver and Ellis Counties, respectively.

Oklahoma State University hosts prescribed fire field days to help inform landowners about the benefits of prescribed fire for controlling invasion of woody vegetation in prairies and improving habitat conditions for wildlife in grassland ecosystems. Prescribed burning is an important tool landowners can use to improve the value of CRP fields and native prairie for wildlife, including the lesser prairie-chicken, by maintaining and improving vegetative structure, productivity, and diversity and by controlling exotic plant species. In 2009, the Environmental Defense Fund partnered with Oklahoma State University to prepare a report on the management of CRP fields for lesser prairie-chicken management. The document (Hickman and Elmore 2009, entire) was designed to provide a decision tree that would assist agencies and landowners with mid-contract management of CRP fields.

Like the other States, ODWC has partnered in the implemention of a State WHIP designed to enhance, create, and manage habitat for all wildlife species, including the lesser prairie-chicken. The State WHIP recently has targeted money for lesser prairie-chicken habitat improvements.

Several different ''Ranch Conversations'' have been held in northwestern Oklahoma over the past 10 years, most recently hosted by the Oklahoma High Plains Resource Development and Conservation Office. These meetings invited private landowners and the general public to discuss lesser prairie-chicken conservation and management, receive information, and provide input on programs and incentives that are available for managing the lesser prairie-chicken on privately owned habitats.

In an effort to address ongoing development of oil and gas resources, the Oklahoma Wildlife Conservation Commission voted to approve a Memorandum of Understanding with the Oklahoma Independent Petroleum Association in February 2012 to establish a collaborative working relationship for lesser prairie-chicken conservation. Through this Memorandum of Understanding, the ODWC and Oklahoma Independent Petroleum Association will identify and develop voluntary steps (Best Management Practices) that can be taken by the Oklahoma Independent Petroleum Association's members to avoid and minimize the impacts of their operations on the lesser prairie-chicken. These Best Management Practices are currently under development.

Oklahoma received a USDA Conservation Innovation Grant to develop a wildlife credits trading program. When completed, the credit trading program will provide incentives to landowners who manage their lands for conservation of the lesser prairie-chicken. Currently, about 2,819 ha (6,965 ac) have been enrolled under the lesser prairie-chicken CRP SAFE continuous signup in Beaver, Beckham, Ellis, and Harper Counties.

The ODWC, in early 2012, entered into a contract with Ecosystem Management Research Institute to develop a conservation plan for the lesser prairie-chicken in Oklahoma. The primary goal of the Oklahoma Lesser Prairie Chicken Conservation Plan is to develop an overall strategy for conservation of the lesser prairie-chicken in Oklahoma. Development of the Oklahoma Lesser Prairie Chicken Conservation Plan will involve synthesis of all pertinent information currently available and input from diverse stakeholders. The Oklahoma Lesser Prairie Chicken Conservation Plan will identify priority conservation areas, population goals, and conservation strategies and actions; it also will link conservation actions to appropriate entities and contain an implementation timeline. A draft document is currently available, public comments were solicited through

August 30, 2012, and the final plan is anticipated in September of 2012.

As discussed above, the ODWC has applied for an enhancement of survival permit pursuant to section 10(a)(1)(A) of the Act that includes a draft umbrella CCAA between the Service and ODWC for the lesser prairie-chicken in 14 Oklahoma counties (77 FR 37917). The draft CCAA and associated draft environmental assessment was made available for public review and comment in June 2012. The Service and ODWC are currently reviewing and addressing public comments, and a permitting decision is anticipated in the near future

The Service's PFW program also has contributed financial and technical assistance for restoration and enhancement activities that benefit the lesser prairie-chicken in Oklahoma. Important measures include control of eastern red cedar and fence marking and removal to minimize collision mortality. The Oklahoma PFW program has implemented 154 private lands agreements on about 38,954 ha (96,258 ac) of private lands for the benefit of the lesser prairie-chicken in the State.

Texas

The Texas Parks and Wildlife Department (TPWD) hosted a series of landowner meetings and listening sessions in 6 (Hemphill, Wheeler, Gray, Bailey, Cochran, and Gaines) of the 13 counties confirmed to be occupied by the lesser prairie-chicken in Texas. Private landowners and the general public were invited to discuss conservation and management, receive information, and provide input on programs and incentives that are available for managing the lesser prairie-chicken on privately owned lands. In response to these meetings, TPWD worked with the Service and landowners to finalize the first statewide umbrella CCAA for the lesser prairie-chicken in Texas. The conservation goal of the Texas CCAA is to encourage protection and improvement of suitable lesser prairie-chicken habitat on non-Federal lands by offering private landowners incentives to implement voluntary conservation measures through available funding mechanisms and by providing technical assistance and regulatory assurances concerning land use restrictions that might otherwise apply should the lesser prairie-chicken become listed. The conservation measures would generally consist of prescribed grazing; prescribed burning; brush management; cropland and residue management; range seeding and enrollment in various Farm Bill programs such as the CRP, the Grassland Reserve Program, and SAFE program; and wildlife habitat treatments through the EQIP. The Texas CCAA covers 50 counties, largely encompassing the Texas panhandle region, and was finalized on May 14, 2009. Currently, 22 private landowners (totaling approximately 255,044 ac) are enrolled under this agreement.

More recently, the TPWD, along with other partners, held five meetings in the Texas panhandle region as part of an effort to promote lesser prairie-chicken conservation. These meetings were held in May of 2009 and were intended to inform landowners about financial incentives and other resources available to improve habitat for the lesser prairie-chicken, including the SAFE program. The objective of the Texas SAFE program, administered by the Farm Service Agency, is to restore 2,093 ha (20,000 ac) of native mixed-grassland habitat for the lesser prairie-chicken in Texas. Additional allocations were approved, and currently some 31,245 ha (77,209 ac) have been enrolled in the SAFE program. Then, in March 2010, TPWD staff conducted a 2-day upland bird workshop where lesser prairie-chicken research and management was discussed.

In 2010, the NRCS and TPWD partnered to create an EQIP focused on lesser prairie-chicken conservation. This program provides technical and financial assistance to landowners interested in implementing land management practices for the lesser prairie-chicken within its historical range.

The Service's PFW program and the TPWD have been actively collaborating on range management programs designed to provide cost-sharing for implementation of habitat improvements for lesser prairie-chickens. The Service provided funding to TPWD to support a Landscape Conservation Coordinator position for the Panhandle and Southern High Plains region, as well as funding to support Landowner Incentive Program projects targeting lesser prairie-chicken habitat improvements (brush control and grazing management) in this region. More than $200,000 of Service funds were committed in 2010, and an additional $100,000 was committed in 2011. Since 2008, Texas has addressed lesser prairie-chicken conservation on some 5,693 ha (14,068 ac) under the Landowner Incentive Program. Typical conservation measures include native plant restoration, control of exotic vegetation, prescribed burning, selective brush management, and prescribed grazing. Currently, the PFW program has executed 66 private lands agreements on about 53,091 ha (131,190 ac) of privately owned lands for the benefit of the lesser prairie-chicken in Texas.

The TPWD continues to establish working relationships with wind developers and provides review and comment on proposed developments whenever requested. Through this voluntary comment process, TPWD provides guidance on how to prevent, minimize, and mitigate impacts from wind and transmission development on lesser prairie-chicken habitat and populations.

A Lesser Prairie-Chicken Advisory Committee also has been established in Texas and functions to provide input and information to the State's Interagency Task Force on Economic Growth and Endangered Species. The purpose of the task force is to provide policy and technical assistance regarding compliance with endangered species laws and regulations to local and regional governmental entities and their communities engaged in economic development activities so that compliance with endangered species laws and regulations is as effective and cost efficient as possible. Input provided by the Lesser Prairie-Chicken Advisory Committee serves to help the Task Force prevent listing and minimize harm to economic sectors if listing does occur. The advisory committee also assists in outreach and education efforts on potential listing decisions and methods to minimize the impact of listing.

The TPWD has worked in conjunction with several Texas universities to fund several lesser prairie-chicken research projects. In one of those projects, TPWD evaluated the use of aerial line transects and forward-looking infrared technology to survey for lesser prairie-chickens. Other ongoing research includes evaluation of lesser prairie-chicken population response to management of shinnery oak and evaluation of relationships among the lesser prairie-chicken, avian predators, and oil and gas infrastructure.

In 2009, the U.S. Department of Energy awarded Texas Tech University and the TPWD a collaborative grant to conduct aerial surveys on approximately 75 percent of the estimated currently occupied range. This project aided in the initial development of a standardized protocol for conducting aerial surveys for the lesser prairie-chicken across the entire range. All five States are currently participating in these surveys; and a complete analysis of the results is expected sometime in the summer of 2012 and will be incorporated in the final determination.

Recently, The Nature Conservancy of Texas acquired approximately 2,428 ha (6,000 ac) of private ranchland in Yoakum and Terry Counties for the purpose of protecting and restoring lesser prairie-chicken habitat. This acquisition helped secure a geographically important lesser prairie-chicken population.

In addition to participation in annual lesser prairie-chicken festivals, the TPWD published an article on the lesser prairie-chicken and wind development in Texas in their agency magazine in October of 2009. The TPWD and the Dorothy Marcille Wood Foundation also produced a 12-page color brochure in 2009 about the lesser prairie-chicken entitled ''A Shared Future.''

In summary, we recognize the importance of the conservation efforts undertaken by all entities across the range of the lesser prairie-chicken. These actions outlined above have, at least in some instances, slowed, but not halted, alteration of lesser prairie-chicken habitat. However, continued implementation of these and similar future actions is crucial to lesser prairie-chicken conservation. In many instances, these efforts have helped reduce the severity of the threats to the species, particularly in localized areas. However, our review of conservation efforts indicates that the measures identified are not adequate to fully address the known threats, including the primary threat of habitat fragmentation, in a manner that effectively reduces or eliminates the threats (see discussion below). All of the efforts are limited in size or duration, and the measures typically are not implemented at a scale that would be necessary to effectively reduce the threats to this species across its known range. Often the measures are voluntary, with little certainty that the measures will be implemented. In some instances, mitigation for existing development within the range of the lesser prairie-chicken has been secured, but the effectiveness of the mitigation is unknown. Conservation of this species will require persistent, targeted implementation of appropriate actions over the range of the species to sufficiently reduce or eliminate the primary threats to the lesser prairie-chicken.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition often results in public awareness and facilitates conservation by Federal, State, Tribal, and local agencies; private organizations; and individuals. The Act encourages cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required by Federal agencies and the prohibitions against certain activities involving listed species are discussed, in part, below.

Recovery Planning

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act requires the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning includes the development of a recovery outline soon after a species is listed, preparation of a draft and final recovery plan, and periodic revisions to the plan as significant new information becomes available. The recovery outline guides the immediate implementation of urgently needed recovery actions and describes the process to be used to develop a recovery plan. The recovery plan identifies site-specific management actions that will achieve recovery of the species, measurable criteria that determine when a species may be downlisted or delisted, and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (comprised of species experts, Federal and State agencies, nongovernment organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our Web site (*http://www.fws.gov/endangered*), or from our Oklahoma Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

In general, the Service believes conservation and eventual recovery of the lesser prairie-chicken should consist of the establishment of secure strongholds or core areas of high quality habitat that are at least 10,117 ha (25,000 ac) in size and support 6–10 active leks, each being used by at least 6 males (Applegate and Riley 1998, p. 14). Ideally these areas would contain minimal amounts of habitat fragmentation and be managed such that the areas are secure from pressures of ongoing development. As fragmentation within these areas increases, the total amount of area would need to expand accordingly such that the total amount of high quality habitat is at least 10,117 ha. It is expected that a minimum of four strongholds will be needed, distributed across the ecological diversity of the species, in order to secure the status of the species. The Service views the species' occupied range as a matrix comprising four primary quadrants, each one exemplifying a unique combination of precipitation, temperature, and vegetation type variables. The quadrants are separated from east to west by the boundary between the shortgrass prairie and central-mixed-grass-prairie Bird Conservation Regions and from north to south by the Canadian River. To ensure redundancy, resiliency, and representation across the species' range, the Service recommends at least one lesser prairie-chicken stronghold be established and maintained in each quadrant. Resiliency refers to the capacity of an ecosystem or an organism to recover quickly from a disturbance by tolerating or adapting to the anticipated alterations caused by the disturbance. Redundancy, in this context, refers to the ability of a species to compensate for fluctuations in or loss of populations across the species' range such that the loss of a single population has little or no lasting effect on the structure and functioning of the species as a whole. Representation refers to the conservation of the diversity of a species.

While a minimum of four strongholds is recommended in order to secure the status of the species, additional strongholds and connections between them will be needed in order to conserve the species. A more complete explanation of this preliminary conservation strategy can be found in the Service's (2012) technical white paper titled ''Conservation Needs of the Lesser Prairie-chicken'' (available at *http://www.regulations.gov*).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribal and nongovernmental organizations,

businesses, and private landowners. Examples of recovery actions include habitat restoration (*e.g.,* restoration of native vegetation), research and monitoring, captive propagation and reintroduction, and outreach and education. Although land acquisition is an example of a type of recovery action, the recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. Consequently, recovery of these species will require cooperative conservation efforts involving private, State, and possibly Tribal lands.

If this species is listed, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, under section 6 of the Act, the States of Colorado, Kansas, New Mexico, Oklahoma, and Texas would be eligible for Federal funds to implement management actions that promote the protection and recovery of the lesser prairie-chicken. Information on our grant programs that are available to aid species recovery can be found at: *http://www.fws.gov/grants.*

Although the lesser prairie-chicken is only proposed for listing under the Act at this time, please let us know if you are interested in participating in recovery efforts for this species. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Federal Agency Consultation

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may adversely affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

Some examples of Federal agency actions within the species' habitat that may require conference or consultation, or both, as described in the preceding paragraph include landscape-altering activities on Federal lands; provision of Federal funds to State and private entities through Service programs, such as the PFW Program, State Wildlife Grant Program, and Federal Aid in Wildlife Restoration program; construction and operation of communication, radio, and similar towers by the Federal Communications Commission or Federal Aviation Administration; issuance of section 404 Clean Water Act permits by the U.S. Army Corps of Engineers; construction and management of petroleum pipeline and power line rights-of-way by the Federal Energy Regulatory Commission; construction and maintenance of roads or highways by the Federal Highway Administration; implementation of certain USDA agricultural assistance programs; Federal grant, loan, and insurance programs; or Federal habitat restoration programs such as EQIP; and development of Federal minerals, such as oil and gas.

Prohibitions and Exceptions

The purposes of the Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in the Act. The Act is implemented through regulations found in the CFR. When a species is listed as endangered, certain actions are prohibited under section 9 of the Act, as specified in 50 CFR 17.21. These prohibitions, which will be discussed further below, include, among others, take within the United States, within the territorial seas of the United States, or upon the high seas; import; export; and shipment in interstate or foreign commerce in the course of a commercial activity.

The Act does not specify particular prohibitions, or exceptions to those prohibitions, for threatened species. Instead, under section 4(d) of the Act, the Secretary of the Interior was given the discretion to issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary also has the discretion to prohibit by regulation with respect to any threatened species, any act prohibited under section 9(a)(1) of the Act. Exercising this discretion, the Service has developed general prohibitions (50 CFR 17.31) and exceptions to those prohibitions (50 CFR 17.32) under the Act that apply to most threatened species. Under 50 CFR 17.43, permits may be issued to allow persons to engage in otherwise prohibited acts. Alternately, for other threatened species, the Service develops specific prohibitions and exceptions that are tailored to the specific conservation needs of the species. In such cases, some of the prohibitions and authorizations under 50 CFR 17.31 and 17.32 may be appropriate for the species and incorporated into a special rule under section 4(d) of the Act, but the 4(d) special rule will also include provisions that are tailored to the specific conservation needs of the threatened species and which may be more or less restrictive than the general provisions at 50 CFR 17.31.

For example, for several fish species that are listed as threatened species, the Service has prepared a 4(d) special rule. In these situations, threatened fish co-occur with other species that are not listed as threatened or endangered species. Recreational fishing of the non-listed species may occur in these areas, usually under a permit or license program managed by the State Conservation Agency. In some of these cases, the Service has prepared a 4(d) special rule which generally prohibits the activities that are defined in the Act for endangered species, but does not prohibit take if it is incidental to recreational fishing activities that are conducted pursuant to an appropriate State program.

Similarly, we are considering whether it is appropriate to fashion a 4(d) rule that would not prohibit take that is incidental to implementing a sector-specific or comprehensive lesser prairie-chicken conservation program. We anticipate that conservation programs given credit under such a 4(d) rule would need to be developed and administered by an entity having jurisdiction or authority over the activities in the program; would need to be approved by the Service as adequately protective to provide a net conservation benefit to the lesser prairie-chicken; and would need to include robust adaptive management, monitoring, and reporting components sufficient to demonstrate that the conservation objectives of the plan are being met.

Several ongoing conservation efforts may satisfy or be moving toward this end, such as the Lesser Prairie-Chicken

Initiative, implementation of a multi-State rangewide conservation strategy, or individual candidate conservation agreements with assurances that currently have permits issued pursuant to section 10 of the Act.

Accordingly, we are soliciting public comment as to which prohibitions, and exceptions to those prohibitions, are necessary and advisable to provide for the conservation of the lesser prairie-chicken (see Public Comments above). After reviewing the initial public comments on this topic, we will evaluate whether a 4(d) special rule is appropriate for the lesser prairie-chicken, and, if so, publish a proposed 4(d) special rule for public comment.

Currently, we have not proposed a 4(d) special rule for the lesser prairie-chicken. If the lesser prairie-chicken is ultimately listed as a threatened species without a 4(d) special rule, the general prohibitions (50 CFR 17.31) and exceptions to these prohibitions (50 CFR 17.32) for threatened species would be applied to the lesser prairie-chicken, as explained above. The prohibitions of section 9(a)(2) of the Act, codified at 50 CFR 17.31 for threatened wildlife, in part, make it illegal for any person subject to the jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these), import, export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any listed species. Under the Lacey Act (18 U.S.C. 42–43; 16 U.S.C. 3371–3378), it is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered and threatened wildlife species under certain circumstances. Regulations governing permits are codified at 50 CFR 17.32 for threatened species. A permit must be issued for the following purposes: for scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities. We anticipate that we would receive requests for all three types of permits, particularly as they relate to development of wind power facilities or implementation of Safe Harbor Agreements. Requests for copies of the regulations regarding listed species and inquiries about prohibitions and permits may be addressed to the Field Supervisor at the address in the **FOR FURTHER INFORMATION CONTACT** section.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a proposed listing on proposed and ongoing activities within the range of species proposed for listing. The following activities could potentially result in a violation of section 9 of the Act; this list is not comprehensive:

(1) Unauthorized collecting, handling, possessing, selling, delivering, carrying, or transporting of the species, including import or export across State lines and international boundaries, except for properly documented antique specimens of these taxa at least 100 years old, as defined by section 10(h)(1) of the Act.

(2) Actions that would result in the unauthorized destruction or alteration of the species' habitat, as previously described in this rule. Such activities could include, but are not limited to, the removal of native shrub or herbaceous vegetation by any means for any infrastructure construction project or direct conversion of native shrub or herbaceous vegetation to another land use.

(3) Actions that would result in the long-term (*e.g.,* greater than 3 years) alteration of preferred vegetative characteristics of lesser prairie-chicken habitat, as previously described in this proposed rule, particularly those actions that would cause a reduction or loss in the native invertebrate community within those habitats. Such activities could include, but are not limited to, inappropriate livestock grazing, the application of herbicides or insecticides, and seeding of nonnative plant species that would compete with native vegetation for water, nutrients, and space.

(4) Actions that would result in lesser prairie-chicken avoidance of an area during one or more seasonal periods. Such activities could include, but are not limited to, the construction of vertical structures such as power lines, fences, communication towers, and buildings; motorized and nonmotorized recreational use; and activities such as well drilling, operation, and maintenance, which would entail significant human presence, noise, and infrastructure.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the Oklahoma Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

Species Information

The lesser prairie-chicken (*Tympanuchus pallidicinctus*) is a species of prairie grouse endemic to the southern high plains of the United States, commonly recognized for its feathered feet, stout build, ground-dwelling habit, and lek mating behavior. The lesser prairie-chicken is closely related and generally similar, although not identical in every aspect of behavior and life history, to other species of North American prairie grouse (*e.g.,* greater prairie-chicken (*T. cupido pinnatus*), Attwater's prairie-chicken (*T. cupido attwateri*), sharp-tailed grouse (*T. phasianellus*), greater sage-grouse (*Centrocercus urophasianus*), and Gunnison's sage-grouse (*C. minimus*)). Plumage of the lesser prairie-chicken is characterized by a cryptic pattern of alternating brown and buff-colored barring, and is similar in mating behavior and appearance, although somewhat lighter in color, to the greater prairie-chicken. Males have long tufts of feathers on the sides of the neck, termed pinnae, that are erected during courtship displays. Pinnae are smaller and less prominent in females. Males also display brilliant yellow supraorbital eyecombs and dull reddish esophageal air sacs during courtship displays (Copelin 1963, p. 12; Sutton 1977, entire; Johnsgard 1983, p. 318). A more detailed summary of the appearance of the lesser prairie-chicken is provided in Hagen and Giesen (2005, unpaginated).

Lesser prairie-chickens are dimorphic in size, with the females being smaller than the males (See Table 1 in Hagen and Giesen 2005, unpaginated). Adult lesser prairie-chicken body length varies from 38 to 41 centimeters (cm) (15 to 16 inches (in)) (Johnsgard 1973, p. 275; Johnsgard 1983, p. 318), and body mass varies from 734 to 813 grams (g) (1.6 to 1.8 pounds (lbs)) for males and 628 to 772 g (1.4 to 1.7 lbs) for females (Giesen 1998, p. 14). Adults weigh more than yearling birds.

Taxonomy

The lesser prairie-chicken is in the Order Galliformes, Family Phasianidae, subfamily Tetraoninae, and is recognized as a species separate from the greater prairie-chicken (Jones 1964, pp. 65–73; American Ornithologist's Union 1998, p. 122). The lesser prairie-chicken was first described as a subspecies of the greater prairie-chicken (Ridgway 1873, p. 199) but was later

named a full species in 1885 (Ridgway 1885, p. 355). Additional information on lesser prairie-chicken systematics and taxonomy can be found in Hagen and Giesen (2005, unpaginated).

Life-History Characteristics

Lesser prairie-chickens are polygynous (a mating pattern in which a male mates with more than one female in a single breeding season) and exhibit a lek mating system. The lek is a place where males traditionally gather to conduct a communal, competitive courtship display. The males use their specialized plumage and vocalizations to attract females for mating. The sequence of vocalizations and posturing of males, often described as ''booming, gobbling, yodeling, bubbling, or duetting,'' has been described by Johnsgard (1983, p. 336) and Haukos (1988, pp. 44–45) and is well summarized by Hagen and Giesen (2005, unpaginated). Male lesser prairie-chickens gather to display on leks at dawn and dusk beginning as early as late January and continuing through mid-May (Copelin 1963, p. 26; Hoffman 1963, p. 730; Crawford and Bolen 1976a, p. 97; Sell 1979, p. 10; Merchant 1982, p. 40), although fewer numbers of birds generally attend leks during the evening (Taylor and Guthery 1980a, p. 8). Male birds may remain on the lek for up to 4 hours (Copelin 1963, pp. 27–28; Sharpe 1968, p. 76; Crawford and Bolen 1975, pp. 808–810; Giesen 1998, p. 7), with females typically departing the lek following successful copulation (Sharpe 1968, pp. 154, 156). Dominant, usually older, males occupy and defend territories near the center of the lek where most of the copulations occur, while younger males occupy the periphery and compete for central access (Sharpe 1968, pp. 73–89; Wiley 1974, p. 203; Ehrlich *et al.* 1988, p. 259). A relatively small number of dominant males account for the majority of copulations at each lek (Sharpe 1968, p. 87; Wiley 1974, p. 203; Locke 1992, p. 1). Young males are rarely successful in breeding due to the dominance by older males. The spring display period may extend into June (Hoffman 1963, p. 730; Jones 1964, p. 66); however, Jones (1964, p. 66) observed some courtship activity even during July in Oklahoma.

Male lesser prairie-chickens exhibit strong site fidelity (loyalty to a particular area; philopatry) to their display grounds (Copelin 1963, pp. 29–30; Hoffman 1963, p. 731; Campbell 1972, pp. 698–699). Such behavior is typical for most species of prairie grouse (*e.g.,* greater prairie-chicken, lesser prairie-chicken, sharp-tailed grouse, greater sage-grouse, and Gunnison's sage-grouse) in North America (Schroeder and Robb 2003, pp. 231–232). Once a lek site is selected, males persistently return to that lek year after year (Wiley 1974, pp. 203–204) and may remain faithful to that site for life. They often will continue to use these traditional areas even when the surrounding habitat has declined in value (for example, concerning greater sage-grouse; see Harju *et al.* 2010, entire). Female lesser prairie-chickens, due to their tendency to nest within 2.5 km (1.5 mi) of a lek (Giesen 1994a, p. 97), also may display fidelity to nesting areas but the degree of fidelity is not clearly established (Schroeder and Robb 2003, p. 292). However, Haukos and Smith (1999, p. 418) observed that female lesser prairie-chickens are more likely to visit older, traditionally used lek sites than temporary, nontraditional lek sites (those used for no more than 2 years). Temporary or satellite leks occasionally may be established during the breeding season and appear indicative of population fluctuations (*e.g.,* an expanding population has more satellite leks than a declining population) (Hamerstrom and Hamerstrom 1973, pp. 7, 13; Schroeder and Braun 1992, p. 280; Haukos and Smith 1999, pp. 415, 417) or habitat quality (Cannon and Knopf 1979, p. 44; Merrill *et al.* 1999, pp. 193–194). Lesser prairie-chicken satellite leks have been observed to form later in the breeding season and coincide with decreased attendance at the permanent leks (Haukos and Smith 1999, p. 418). These satellite leks consisted primarily of birds that were unable to establish territories on the permanent leks (Haukos and Smith 1999, p. 418). Locations of traditional, permanent lek sites also may change in response to disturbances (Crawford and Bolen 1976b, pp. 238–240; Cannon and Knopf 1979, p. 44).

Because of this fidelity to breeding areas, prairie grouse may not immediately demonstrate a population response when faced with environmental change. Considering that landscapes and habitat suitability can change rapidly, strong site fidelity can result in a lag period between when a landscape degradation occurs and when a population response is observed (Gregory *et al.* 2011, pp. 29–30). In some birds exhibiting strong philopatry, Wiens *et al.* (1986, p. 374) thought that the overall response to a particular habitat alteration might not become evident until after the most site-tenacious individuals had died. Delayed population responses have been observed in birds impacted by wind energy development (Stewart *et al.* 2007, pp. 5–6) and in greater sage-grouse impacted by oil and gas development (Doherty *et al.* 2010, p. 5). Consequently routine lek count surveys typically used to monitor prairie grouse may be slow in revealing impacts of environmental change (Gregory *et al.* 2011, pp. 29–30).

Leks are normally located on the tops of wind-swept ridges, exposed knolls, sparsely vegetated dunes, and similar features in areas having low vegetation height or bare soil and enhanced visibility of the surrounding area (Copelin 1963, p. 26; Jones 1963a, p. 771; Taylor and Guthery 1980a, p. 8). The features associated with lek sites also may contribute to the transmission of sounds produced during lekking (Butler *et al.* 2010, entire) and these sounds may aid females in locating lek sites (Hagen and Giesen 2005, unpaginated). Background noises are known to increase in landscapes altered by human development and may interfere with normal behavioral activities (Francis *et al.* 2009, p. 1415). Birds may be particularly vulnerable to elevated levels of background noise, due to their reliance on acoustic communication, and elevated noise levels may negatively impact breeding in some birds particularly where acoustic cues are used during the reproductive process (Francis *et al.* 2009, pp. 1415, 1418).

Areas that have been previously disturbed by humans, such as infrequently used roads, abandoned drilling pads, abandoned farmland, recently cultivated fields, and livestock watering sites also can be used as lek sites (Crawford and Bolen 1976b, pp. 238–239; Davis *et al.* 1979, pp. 81, 83; Sell 1979, p. 14; Taylor 1979, p. 707). However, ongoing human activity, such as presence of humans or noise, may discourage lekking by causing birds to flush, and, in some instances, may cause lek sites to be abandoned (Hunt and Best 2004, pp. 2, 124). Leks often are surrounded by taller, denser cover that is used for escape, thermal cover, and feeding cover. New leks can be formed opportunistically at any appropriate site within or adjacent to nesting habitat. Evidence of expanding lesser prairie-chicken populations tends to be demonstrated by increases in the number of active leks rather than by increases in the number of males displaying per lek (Hoffman 1963, p. 731; Snyder 1967, p. 124; Cannon and Knopf 1981, p. 777; Merchant 1982, p. 54; Locke 1992, p. 43).

Females arrive at the lek in early spring after the males begin displaying, with peak hen attendance at leks

typically occurring in early to mid-April (Copelin 1963, p. 26; Hoffman 1963, p. 730; Crawford and Bolen 1975, p. 810; Davis *et al.* 1979, p. 84; Merchant 1982, p. 41; Haukos 1988, p. 49). Sounds produced by courting males serve to advertise the presence of the lek to females in proximity to the display ground (Robb and Schroeder 2005, p. 29). Within 1 to 2 weeks of successful mating, the hen will select a nest site, normally within 1 to 3 km (0.6 to 2 mi) of a lek (Copelin 1963, p. 44; Giesen 1994a, p. 97), construct a nest, and lay a clutch of 8 to 14 eggs (Bent 1932, p. 282; Copelin 1963, p. 34; Merchant 1982, p. 44; Fields 2004, pp. 88, 115–116; Hagen and Giesen 2005, unpaginated; Pitman *et al.* 2006a, p. 26). Nesting is generally initiated in mid-April and concludes in late May (Copelin 1963, p. 35; Snyder 1967, p. 124; Merchant 1982, p. 42; Haukos 1988, pp. 7–8). Hens most commonly lay one egg per day and initiate incubation once the clutch is complete (Hagen and Giesen 2005, unpaginated). Incubation lasts 24 to 27 days (Coats 1955, p. 18; Sutton 1968, p. 679; Pitman *et al.* 2006a, p. 26) with hatching generally peaking in late May through mid-June (Copelin 1963, p. 34; Merchant 1982, p. 42; Pitman *et al.* 2006a, p. 26). Hens typically leave the nest within 24 hours after the first egg hatches (Hagen and Giesen 2005, unpaginated). Renesting may occur when the first attempt is unsuccessful (a successful nest is one in which at least one egg hatches) (Johnsgard 1973, pp. 63–64; Merchant 1982, p. 43; Pitman *et al.* 2006a, p. 25). Renesting is more likely when nest failure occurs early in the nesting season and becomes less common as the nesting season progresses (Pitman *et al.* 2006a, p. 27). Clutches associated with renesting attempts tend to be smaller than clutches at first nesting (Fields 2004, p. 88; Pitman *et al.* 2006a, p. 27).

Nests generally consist of bowl-shaped depressions in the soil (Giesen 1998, p. 9). Nests are lined with dried grasses, leaves, and feathers, and there is no evidence that nests are reused in subsequent years (Giesen 1998, p. 9). Adequate herbaceous cover, including residual cover from the previous growing season, is an important factor influencing nest success, primarily by providing concealment of the nest (Suminski 1977, p. 32; Riley 1978, p. 36; Riley *et al.* 1992, p. 386; Giesen 1998, p. 9). Young are precocial (mobile upon hatching) and nidifugous (typically leaving the nest within hours of hatching) (Coats 1955, p. 5). Chicks are usually capable of short flights by 14 days of age (Hagen and Giesen 2005, unpaginated). Broods may remain with females for up to 18 weeks (Giesen 1998, p. 9; Pitman *et al.* 2006c, p. 93), but brood breakup generally occurs by September when the chicks are approximately 70 days of age (Taylor and Guthery 1980a, p. 10). Males do not incubate the eggs, assist in chick rearing, or provide other forms of parental care (Wiley 1974, p. 203). Nest success (proportion of nests that hatch at least one egg) varies, but averages about 30 percent (range 0–67 percent) (Hagen and Giesen 2005, unpaginated).

Availability of food and cover are key factors that affect chick and juvenile survival. Chick survival averaged only about 25 percent during the first 35 days following hatching (Hagen 2003, p. 135). Survival for chicks between 35 days of age and the following spring was estimated to be 53.9 percent in southwestern Kansas (Hagen *et al.* 2009, p. 1326). Jamison (2000, p. 57) estimated survival of chicks from hatching to early autumn (60 days post-hatching), using late summer brood sizes provided in several early studies, to be 27 percent in Kansas and 43–65 percent in Oklahoma. These values were considerably higher than the 19 percent he observed in his study and may reflect an inability in the earlier studies to account for the complete loss of broods and inclusion of mixed broods (combined broods from several females) when estimating brood size (Jamison 2000, p. 57). Pitman *et al.* (2006b, p. 677) estimated survival of chicks from hatching to 60-days post-hatching to be 17.7 percent. Recruitment was characterized as low with survival of juvenile birds from hatching to the start of the first breeding season the following year estimated to be only 12 percent (Pitman *et al.* 2006b, pp. 678–680), which may be a significant limiting factor in southwestern Kansas. However, the authors cautioned that these estimates might not be indicative of survival estimates in other areas due to low habitat quality, specifically poor distribution of nesting and brood-rearing habitats within the study area (Pitman *et al.* 2006b, p. 680).

Lesser prairie-chicken home ranges vary both by sex and by season and may be influenced by a variety of factors. Males tend to have smaller home ranges than do females, with the males generally remaining closer to the leks than do the females (Giesen 1998, p. 11). In Colorado, Giesen (1998, p. 11) observed that spring and summer home ranges for males were 211 ha (512 ac) and for females were 596 ha (1,473 ac). In the spring, home ranges are fairly small when daily activity focuses on lekking and mating. Home ranges of nesting females in New Mexico varied, on average, from 8.5 to 92 ha (21 to 227 ac) (Merchant 1982, p. 37; Riley *et al.* 1994, p. 185). Jamison (2000, p. 109) observed that range size peaked in October as birds began feeding in recently harvested grain fields. Median range size in October was 229 to 409 ha (566 to 1,400 ac). In Texas, Taylor and Guthery (1980b, p. 522) found that winter monthly home ranges for males could be as large as 1,945 ha (4,806 ac) and that subadults tended to have larger home ranges than did adults. More typically, winter ranges are more than 300 ha (740 ac) in size, and the size declines considerably by spring. Based on observations from New Mexico and Oklahoma, lesser prairie-chicken home ranges increase during periods of drought (Giesen 1998, p. 11; Merchant 1982, p. 55), possibly because of reduced food availability and cover. Davis (2005, p. 3) states that the combined home range of all lesser prairie-chickens at a single lek is about 49 square kilometers (sq km) (19 square miles (sq mi) or 12,100 ac).

Many grouse species are known to be relatively poor dispersers and normally move less than 40 km (25 mi) (Braun *et al.* 1994, pp. 432–433). Dispersal helps maintain healthy, robust populations by contributing to population expansion, recolonization, and gene flow (Sutherland *et al.* 2000, unpaginated). In lesser prairie-chickens, most movements within a given season are less than 10 km (6.2 mi), but Jamison (2000, p. 107) thought that movements as large as 44 km (27.3 mi) might occur in fragmented landscapes. Recent studies of lesser prairie-chicken in Kansas demonstrated some birds may move as much as 50 km (31 mi) from their point of capture (Hagen *et al.* 2004, p. 71). Although recorded dispersal movements indicate that lesser prairie-chickens are obviously physically capable of longer distance dispersal movements, these longer movements appear to be infrequent. Jamison (2000, p. 107) recorded only 2 of 76 tagged male lesser prairie-chickens left the 5,760 ha (14,233 ac) primary study area over a 3-year period. He thought site fidelity rather than habitat was more important in influencing movements of male lesser prairie-chickens (Jamison 2000, p. 111). Environmental factors also may influence dispersal patterns, particularly in fragmented landscapes where predation rates may be higher and habitat suitability may be reduced in smaller sized parcels. Lesser prairie-chickens appear to be sensitive to the size of habitat fragments and may avoid using parcels below a preferred size

regardless of habitat type or quality (see separate discussion under ''Effects of Habitat Fragmentation'' below). As the landscape becomes more fragmented, longer dispersal distances over areas of unsuitable habitats may be required.

Daily movements of males tend to increase in fall and winter and decrease with onset of spring, with median daily movements typically being less than 786 meters per day (Jamison 2000, pp. 106, 112). In Texas, Haukos (1988, p. 46) recorded daily movements of 0.1 km (0.06 mi) to greater than 6 km (3.7 mi) by female lesser prairie-chickens prior to onset of incubation. Taylor and Guthery (1980b, p. 522) documented a single male moving 12.8 km (8 mi) in 4 days, which they considered to be a dispersal movement. Because lesser prairie-chickens exhibit limited dispersal ability and do not typically disperse over long distances, they do not readily recolonize areas following localized extinctions, particularly where the distance between habitat patches exceeds their typical dispersal capabilities.

In general, there is little documentation of historical dispersal patterns, and the existence of large-scale migration movements is not known. However, both Bent (1932, pp. 284–285) and Sharpe (1968, pp. 41–42) thought that the species, at least historically, might have been migratory with separate breeding and wintering ranges. Taylor and Guthery (1980a, p. 10) also thought the species was migratory prior to widespread settlement of the High Plains, but migratory movements have not recently been documented. The lesser prairie-chicken is now thought to be nonmigratory.

Lesser prairie-chickens forage during the day, usually during the early morning and late afternoon, and roost at night (Jones 1964, p. 69). Diet of the lesser prairie-chicken is very diverse, primarily consisting of insects, seeds, leaves, and buds and varies by age, location, and season (Giesen 1998, p. 4). They forage on the ground and within the vegetation layer (Jones 1963b, p. 22) and are known to consume a variety of invertebrate and plant materials. For example, in New Mexico, Smith (1979, p. 26) documented 30 different kinds of food items consumed by lesser prairie-chickens. In Texas, Crawford and Bolen (1976c, p. 143) identified 23 different plants in the lesser prairie-chicken diet. Jones (1963a, pp. 765–766), in the *Artemesia filifolia* (sand sagebrush) dominated grasslands of Oklahoma, recorded 16 different plant species eaten by lesser prairie-chickens.

Lesser prairie-chicken energy demands are almost entirely derived from daily foraging activities rather than stored fat reserves (Giesen 1998, p. 4). Olawsky (1987, p. 59) found that, on average, lesser prairie-chicken body fat reserves were less than 4.5 percent of body weight. Consequently, quality and quantity of food consumed can have a profound effect on the condition of individual birds. Inadequate food supplies and reduced nutritional condition can affect survival, particularly during harsh winters, and reproductive potential. Poor condition can lead to poor performance on display grounds, impact nesting success, and reduce overwinter survival. Sufficient nutrients and energy levels are important for reproduction and overwintering. Males expend energy defending territories and mating while females have demands of nesting, incubation, and any renesting. Reduced condition can lead to smaller clutch sizes. Because lesser prairie-chicken diets vary considerably by age, season, and habitat type and quality, habitat alteration can influence availability of certain foods. While not as critical for adults, presence of forbs and associated insect populations can be very important for proper growth and development of chicks and poults.

Generally, chicks and young juveniles tend to forage almost exclusively on insects, such as grasshoppers and beetles, and other animal matter while adults tend to consume a higher percentage of vegetative material (Giesen 1998, p. 4). The majority of the published diet studies have been conducted in the southwestern portions of the historical range where the *Quercus havardii* (shinnery oak) dominated grasslands are prevalent. Throughout their range, when available, lesser prairie-chickens will use cultivated grains, such as *Sorghum vulgare* (grain sorghum) and *Zea mays* (corn), during the fall and winter months (Snyder 1967, p. 123; Campbell 1972, p. 698; Crawford and Bolen 1976c, pp. 143–144; Ahlborn 1980, p. 53; Salter *et al.* 2005, pp. 4–6). However, lesser prairie-chickens tend to predominantly rely on cultivated grains when production of natural foods, such as acorns and grass and forb seeds are deficient (Copelin 1963, p. 47; Ahlborn 1980, p. 57).

Food availability for gamebird young is most critical during the first 20 days (3 weeks) post-hatching when rapid growth is occurring (Dobson *et al.* 1988, p. 59). Diet of lesser prairie-chicken chicks less than 5 weeks of age is entirely composed of insects and similar animal matter. Specifically, diet of chicks in New Mexico that were less than 2 weeks of age was 80 percent treehoppers (Mebracidae) (Davis *et al.* 1979, p. 71; Davis *et al.* 1980 p. 78). Overall, chicks less than 5 weeks of age consumed predominantly (87.7 percent) short-horned grasshoppers (Acrididae), treehoppers, and long-horned grasshoppers (Tettigonidae) (Davis *et al.* 1980, p. 78). Ants (Formicidae), mantids (Mantidae), snout beetles (Curculionidae), darkling beetles (Tenebrionidae), robber flies (Asilidae), and cockroaches (Blattidea) collectively provided the remaining 12.3 percent of the chicks' diet (Davis *et al.* 1980, p. 78). Similarly Suminski (1977, pp. 59–60) examined diet of chicks 2 to 4 weeks of age in New Mexico and found that diet was entirely composed of insects. Treehoppers, short-horned grasshoppers, and ants were the most significant (95 percent) items consumed, by volume. Insects and similar animal matter are a particularly prevalent component in the diet of young prairie-chickens (Drake 1994, pp. 31, 34, 36). Insects are high in protein (Riley *et al.* 1998, p. 42), and a high-protein diet was essential in pheasants for normal growth and feather development (Woodward *et al.* 1977. p. 1500). Insects and other arthropods also have been shown to be extremely important in the diet of young sage grouse and Attwater's prairie-chicken (Service 2010, pp. 30–31).

Older chicks between 5 and 10 weeks of age ate almost entirely short-horned grasshoppers (80.4 percent) (Davis *et al.* 1980, p. 78). They also began to consume plant material during this period. Shinnery oak acorns, seeds of *Lithospermum incisum* (narrowleaf stoneseed), and foliage and flowers of *Commelina erecta* (erect dayflower) comprised less than 1 percent of the diet (Davis *et al.* 1980, p. 78). Correspondingly, Suminski (1977, pp. 59, 61) observed that chicks between 6 and 10 weeks of age had begun to consume very small quantities (1.3 percent by volume) of plant material. The remainder of the diet was still almost entirely composed of insects. By far the most prevalent insect was short–horned grasshoppers (Acrididae), accounting for 73.9 percent of the diet (Davis *et al.* 1980, p. 78). As the birds grew, the sizes of insects eaten increased. Analysis of food habits of juvenile birds from 20 weeks of age and older, based on samples collected between August and December, revealed that 82.6 percent of diet was plant material by volume and 17.4 percent was invertebrates (Suminski 1977, p. 62). Shinnery oak acorns contributed 67 percent of the overall diet, by volume. Key insects included crickets (Gryllidae), short-horned grasshoppers,

mantids, and butterfly (Lepidoptera) larvae.

Plant materials are a principal component of the diet for adult lesser prairie-chickens; however, the composition of the diet tends to vary by season and habitat type. The majority of the diet studies examined foods contained in the crop (an expanded, muscular pouch within the digestive tract of most birds that aids in breakdown and digestion of foods) and were conducted in habitats supporting shinnery oak. However, Jones (1963b, p. 20) reported on lesser prairie-chicken diets from sand sagebrush habitats.

In the spring (March, April, and May), lesser prairie-chickens fed heavily on green vegetation (60 to 79 percent) and mast and seeds (15 to 28 percent) (Davis *et al.* (1980, p. 76; Suminski 1977, p. 57). Insects comprised less than 13 percent of the diet primarily due to their relative scarcity in the spring months. Treehoppers and beetles were the most common types of insects found in the spring diet. The proportion of vegetative material provided by shinnery oak leaves, catkins, and acorns was high. Similarly, Doerr (1980, p. 8) also examined the spring diet of lesser prairie-chickens. However, he compared diets between areas treated with the herbicide tebuthiuron and untreated areas, and it is unclear whether the birds he examined came from treated or untreated areas. Birds collected from treated areas likely would have limited access to shinnery oak, possibly altering the observed occurrence of shinnery oak in the diet. He reported that animal matter was the dominant component of the spring diet and largely consisted of short-horned grasshoppers and darkling beetles (Doerr 1980, pp. 30–31). Ants, ground beetles (Carabidae), and stinkbugs (Pentatomidae) were slightly less prevalent in the diet. Shinnery oak acorns and plant seeds were the least common component, by volume, in the diet in the Doerr (1980) studies.

In the summer, insects become a more important component of the diet. In New Mexico, insects comprised over half (55.3 percent) of the overall summer (June, July, and August) diet with almost half (49 percent) of the insects being short- and long-horned grasshoppers and treehoppers (Davis *et al.* 1980, p. 77). Plant material consumed was almost equally divided between foliage (leaves and flowers; 23.3 percent) and mast and seeds (21.4 percent). Shinnery oak parts comprised 22.5 percent of the overall diet. Olawsky (1987, pp. 24, 30) also examined lesser prairie-chicken diets during the summer season (May, June, and July); however, he also compared diets between areas treated with tebuthiuron and untreated pastures in Texas and New Mexico. While the diets in treated and untreated areas were different, the diet from the untreated area should be representative of a typical summer diet. Total plant matter from birds collected from the untreated areas comprised 68 to 81 percent, by volume (Olawsky 1987, pp. 30–32). Foliage comprised 21 to 25 percent, and seeds and mast, 36 to 60 percent, of the diet from birds collected in the untreated area. Shinnery oak acorns were the primary form of seeds and mast consumed. Animal matter comprised 19 to 32 percent of the overall diet, and almost all of the animal matter consisted of treehoppers and short-horned grasshoppers (Olawsky 1987, pp. 30–32).

Several studies have reported on the fall and winter diets of lesser prairie-chickens. Davis *et al.* (1979, pp. 70–80), Smith (1979, pp. 24–32), and Riley *et al.* (1993, pp. 186–189) all reported on lesser prairie-chicken food habits from southeastern New Mexico (Chaves County), where the birds had no access to grain fields (Smith 1979, p. 31). They generally found that fall (October to early December) and winter (January and February) diets generally consist of a mixture of seeds, vegetative material, and insects.

The fall diet differed between years primarily due to reduced availability of shinnery oak acorns (Smith 1979, p. 25). Reduced precipitation in the fall of 1976 was thought to have influenced acorn production in 1977 (Riley *et al.* 1993, pp. 188). When acorns were available, shinnery oak acorns comprised almost 62 percent, by volume, of the diet but less than 17 percent during a year when the acorn crop failed (Smith 1979, p. 26). On average, total mast and seeds consumed was 43 percent, vegetative material was 39 percent, and animal matter was 18 percent by volume of the fall diet (Davis *et al.* 1979, p. 76). Over 81 percent of the animal matter consumed was short-horned grasshoppers (Davis *et al.* 1979, p. 76).

Crawford (1974, pp. 19–20, 35–36) and Crawford and Bolen (1976c, pp. 142–144) reported on the fall (mid-October) diet of lesser prairie-chickens in west Texas over a 3-year period. Twenty-three species of plants were identified from the crops over the course of the study. Plant matter accounted for 90 percent of the food present by weight and 81 percent by volume. Grain sorghum also was prevalent, comprising 63 percent by weight and 43 percent by volume of total diet. Alhborn (1980, pp. 53–58) also documented use of grain sorghum during the fall and winter in eastern New Mexico. The remainder of the diet (10 percent by weight and 19 percent by volume) was animal matter (insects only). Over 62 percent, by volume, of the animal matter was composed of short-horned grasshoppers. Other insects that were important in the diet included darkling beetles, walking sticks (Phasmidae), and wingless long-horned grasshoppers (Gryllacrididae). During the fall and winter in eastern New Mexico, Alhborn (1980, pp. 53–58) reported that vegetative material from shinnery oak constituted 21 percent of the total diet.

Similarly, Doerr (1980, p. 32) reported on the lesser prairie-chickens from west Texas in the fall (October). The diet largely comprised animal matter (86 percent by volume) with short-horned grasshoppers contributing 81 percent by volume of the total diet. Stinkbugs also were prevalent in the diet. Foliage was the least important component, consisting of only 2.5 percent by volume. Seeds and acorns comprised 11 percent of the diet and consisted entirely of shinnery oak acorns and seeds of *Linum rigidum* (stiffstem flax).

Shinnery oak acorns (69 percent) and annual buckwheat (14 percent) were the primary components of the winter (January and February) diet of lesser prairie-chickens in southeastern New Mexico (Riley *et al.* 1993, p. 188). Heavy selection for acorns in winter was attributed to need for a high energy source to help sustain body temperature in cold weather (Smith 1979, p. 28). Vegetative matter was about 26 percent of overall diet, by volume, with 5 percent of the diet consisting of animal matter, almost entirely comprising ground beetles (Carabidae) (Davis *et al.* 1979, p. 78).

In contrast to the above studies, Jones (1963b, p. 20) and Doerr (1980, p. 8) examined food items present in the droppings rather than from the crops. Although this approach is valid, differential digestion of the food items likely overemphasizes the importance of indigestible items and underrepresents occurrence of foods that are highly digestible (Jones 1963b, p. 21; Doerr 1980, pp. 27, 33). Jones' study site was located in the sand sagebrush dominated grasslands in the more northern portion of the historical range where shinnery oak was unavailable. However, Doerr's study site was located in the shinnery oak dominated grasslands of the southwest Texas panhandle.

In the winter (December through February), where *Rhus trilobata* (skunkbush sumac) was present, Jones (1963b, pp. 30, 34) found lesser prairie-chickens primarily used sumac buds

and foliage of sumac, sand sagebrush, and *Gutierrezia sarothrae* (broom snakeweed), particularly when snow was on the ground. Small annual plants present in the diet were *Vulpia* (*Festuca*) *octoflora* (sixweeks fescue), annual buckwheat, and *Evax prolifera* (big-headed evax; bigheaded pygmycudweed) (Jones 1963b, p. 30). Grain sorghum wasn't used to any appreciable extent, particularly when skunkbush sumac was present, but was eaten when available. Relatively few insects were available during the winter period. However, beetles were consumed throughout the winter season and grasshoppers were important in December. Doerr (1980, p. 28) found grasshoppers, crickets, ants, and wasps were the most commonly observed insects in the winter diet. Foliage from sand sagebrush and *Cryptantha cinerea* (James' cryptantha) was prevalent, but shinnery oak acorns were by far the most significant plant component detected in the winter diet.

In the spring (March through May), lesser prairie-chickens used seeds and foliage of early spring annuals such as *Viola bicolor* (johnny jumpup) and *Silene antirrhina* (sleepy catchfly) (Jones 1963b, p. 49). Skunkbush sumac continued to be an important component of the diet. Insect use increased as the spring season progressed. Doerr (1980, p. 29) also observed that grasshoppers and crickets were prevalent in the spring diet. However, foliage and acorns of shinnery oak were more abundant in the diet than any other food item.

In the summer (June through August), lesser prairie-chickens continued to use sumac and other plant material, but insects dominated the diet (Jones 1963b. pp. 64–65). Grasshoppers were the principal item found in the diet, but beetles were particularly favored in shrubby habitats. Similarly, Doerr (1980, p. 25) found grasshoppers and crickets were the most important component of the summer diet followed in importance by beetles. Jones (1963b, pp. 64–65) reported fruits from skunkbush sumac to be the most favored plant material in the diet. Doerr (1980, p. 25) found James cryptantha and erect dayflower were the two most important plants in the diet in his study. Insects remained a principal food item in the fall (September through November), at least until November when plant foods, such as *Cyperus schweinitzii* (flatsedge) and *Ambrosia psilostachya* (western ragweed) became more prevalent in the diet (Jones 1963b, pp. 80–81).

Little is known regarding the specific water requirements of the lesser prairie-chicken, but their distribution does not appear to be influenced by the presence of surface water. Total annual precipitation across the range of the lesser prairie-chicken varies, on average, from roughly 63 cm (25 in) in the eastern portions of the historical range to as little as 25 cm (10 in) in the western portions of the range. Consequently, few sources of free-standing surface water existed in lesser prairie-chicken historical range prior to settlement. Lesser prairie-chickens likely rely on food sources and consumption of dew to satisfy their metabolic moisture requirement (Snyder 1967, p. 123; Hagen and Giesen 2005, unpaginated; Bidwell *et al.* 2002, p. 6) but will use surface water when it is available. Because much of the historically occupied range is now used for domestic livestock production, numerous artificial sources of surface water, such as stock ponds and stock tanks, have been developed throughout the region. Several studies have documented use of these water sources by lesser prairie-chickens during the spring, late summer, and fall seasons (Copelin 1963, p. 20; Jones 1964, p. 70; Crawford and Bolen 1973, pp. 471–472; Crawford 1974, p. 41; Sell 1979, p. 31), and they may be particularly important during periods of drought (Crawford and Bolen 1973, p. 472; Crawford 1974, p. 41). Hoffman (1963, p. 732) supported development of supplemental water sources (*i.e.,* guzzlers) as a potential habitat improvement tool. Others, such as Davis *et al.* (1979, pp. 127–128) and Applegate and Riley (1998, p. 15) cautioned that creating additional surface water sources will influence grazing pressure and possibly contribute to degradation of habitat conditions for lesser prairie-chickens. Some livestock watering facilities may create hazardous conditions (*e.g.,* drowning; Sell 1979, p. 30), but the frequency of these incidents is unknown.

Lesser prairie-chickens have a relatively short lifespan and high annual mortality. Campbell (1972, p. 694) estimated a 5-year maximum lifespan, although an individual nearly 7 years old has been documented in the wild by the Sutton Avian Research Center (Sutton Center) (Wolfe 2010). Differences in survival may be associated with sex, weather, harvest (where allowed), age, and habitat quality. Campbell (1972, p. 689), using 9 years of band recovery data from New Mexico, estimated annual mortality for males to be 65 percent. Hagen *et al.* (2005, p. 82) specifically examined survival in male lesser prairie-chickens in Kansas and found apparent survival varied by year and declined with age. Annual mortality was estimated to be 55 percent (Hagen *et al.* 2005, p. 83). Male survival may be lower during the breeding season due to increased predation or costs associated with territorial defense while lekking (Hagen *et al.* 2005, p. 83). In female lesser prairie-chickens, Hagen *et al.* (2007, p. 522) estimated that annual mortality in two remnant patches of native sand sagebrush prairie near Garden City, Finney County, Kansas was about 50 percent at a study site southwest of Garden City and about 65 percent at a study site southeast of Garden City).

Adult annual survival in Texas apparently varied by habitat type. In sand sagebrush habitat, survival was estimated to be 0.52, whereas survival was only 0.31 in shinnery oak habitat (Lyons *et al.* 2009, p. 93). For both areas, survival was about 4 percent lower during the breeding season than during the nonbreeding period (Lyons *et al.* 2009, p. 93). Hagen *et al.* (2007, p. 522) also reported lower survival during the reproductive season (31 percent mortality) compared to the nonbreeding season (23 percent mortality) in Kansas. However, survival times did not differ between sand sagebrush habitats in Oklahoma and shinnery oak habitats in New Mexico (Patten *et al.* 2005a, p. 1274). Birds occupying sites with greater than 20 percent shrub cover survived longer than those in areas with less dense shrub cover (Patten *et al.* 2005a, p. 1275).

Habitat

The preferred habitat of the lesser prairie-chicken is native short- and mixed-grass prairies having a shrub component dominated by *Artemesia filifolia* (sand sagebrush) or *Quercus havardii* (shinnery oak) (hereafter described as native rangeland) (Donaldson 1969, pp. 56, 62; Taylor and Guthery 1980a, p. 6; Giesen 1998, pp. 3–4). Small shrubs are important for summer shade (Copelin 1963, p. 37; Donaldson 1969, pp. 44–45, 62), winter protection, and as supplemental foods (Johnsgard 1979, p. 112). Historically, trees and other tall woody vegetation were largely absent from these grassland ecosystems, except in canyons and along water courses. Landscapes supporting less than 63 percent native rangeland appear incapable of supporting self-sustaining lesser prairie-chicken populations (Crawford and Bolen 1976a, p. 102).

Outside of the grasslands in Kansas, lesser prairie-chickens are primarily found in the sand sagebrush dominated rangelands of Colorado, Kansas, Oklahoma, and Texas, and in the shinnery oak-bluestem grasslands of

New Mexico, Oklahoma, and Texas. Sand sagebrush is a 0.6- to 1.8-m (2- to 6-ft) tall shrub that occurs in 11 States of the central and western United States (Shultz 2006, p. 508). Within the central and southern Great Plains, sand sagebrush is often a dominant species on sandy soils and may exhibit a foliar cover of 20 to 50 percent (Collins *et al.* 1987, p. 94; Vermeire 2002, p. 1). Sand-sage shrublands have been estimated to occupy some 4.8 million ha (11.8 million ac) in the central and southern Great Plains (Berg 1994, p. 99).

The shinnery oak vegetation type is endemic to the southern great plains and is estimated to have historically covered an area of 2.3 million ha (over 5.6 million ac), although its current range has been considerably reduced through eradication (Mayes *et al.* 1998, p. 1609). The distribution of shinnery oak overlaps much of the historical lesser prairie-chicken range in New Mexico, Oklahoma, and Texas (Peterson and Boyd 1998, p. 2). Shinnery oak is a rhizomatous (a horizontal, usually underground stem that often sends out roots and shoots from its nodes) shrub that reproduces slowly and does not invade previously unoccupied areas (Dhillion *et al.* 1994, p. 52). Mayes *et al.* (1998, p. 1611) documented that a single rhizomatous shinnery oak can occupy an area exceeding 7,000 square meters (sq m) (75,300 square feet (sq ft)). While not confirmed through extensive research throughout the plant's range, it has been observed that shinnery oak in some areas multiplies by slow rhizomatous spread and eventual fracturing of underground stems from the original plant. In this way, single clones have been documented to occupy up to 81 ha (200 ac) over an estimated timeframe of 13,000 years (Cook 1985, p. 264; Anonymous 1997, p. 483), making shinnery oak possibly the largest and longest-lived plant species in the world.

Within the historical range of the species, the USDA's CRP, administered by the Farm Services Administration, has promoted the establishment and conservation of certain grassland habitats. Originally funded as a mechanism to reduce erosion from highly erodible soils, the program has since become a means to at least temporarily retire any environmentally sensitive cropland from production and establish vegetative cover on that land. Initially, many types of grasses were approved for use as permanent vegetative cover, including several that are introduced or nonnative. As the program changed and efforts to establish more environmentally beneficial grasses gained momentum, the use of native grasses became more prevalent. In Kansas in particular, much of the vegetative cover established through the CRP within the historical range of the lesser prairie-chicken was a mix of native warm-season grasses such as *Schizachyrium scoparium* (little bluestem), *Bouteloua curtipendula* (sideoats grama), and *Panicum virgatum* (switchgrass) (Rodgers and Hoffman 2005, p. 120). These grasses are important components of lesser prairie-chicken habitat and have led to reoccupation of large areas of the historical range in western Kansas by lesser prairie-chickens, particularly north of the Arkansas River.

In other areas, nonnative grasses were used that provided limited to no habitat value for the lesser prairie-chicken. Exotic old world bluestems and *Eragrostis curvula* (weeping lovegrass) were extensively seeded in CRP tracts in Texas, New Mexico, and Oklahoma (Haufler *et al.* 2012, p. 17). For example, about 70 to 80 percent of the original CRP seedings in eastern New Mexico consisted of dense, single-species stands of weeping lovegrass, *Bothriochloa bladhii* (Caucasian bluestem), or *B. ischaemum* (yellow bluestem) (Rodgers and Hoffman 2005, p. 122). Consequently these areas contributed very little to lesser prairie-chicken conservation as they provide poor-quality nesting habitat. As these nonnative grasslands have matured, some species of native grasses and shrubs are beginning to reestablish within these fields. Although these areas still have limited habitat value for lesser prairie-chickens, the species is occasionally using these older stands of grass for roosting and nesting (Rodgers and Hoffman 2005, p. 122). Where CRP lands support the suitable vegetative structure and composition required by lesser prairie-chickens, these fields can provide suitable, but likely temporary, habitat. More information on the CRP program is provided in the sections that follow.

Leks are characterized by areas of sparse vegetation and are generally located on elevated features, such as ridges or grassy knolls (Giesen 1998, p. 4). Vegetative cover characteristics, primarily height and density, may have a greater influence on lek establishment than elevation (Giesen 1998, p. 4). Copelin (1963, p. 26) observed display grounds within short grass meadows of valleys where sand sagebrush was tall and dense on the adjacent ridges. Early spring fires also encouraged lek establishment when vegetation likely was too high (0.6 to 1.0 m (2.0 to 3.3 ft)) to facilitate displays (Cannon and Knopf 1979, pp. 44–45). Several authors, as discussed in Giesen (1998, p. 4), observed that roads, oil and gas pads, and similar forms of human disturbance create habitat conditions that may encourage lek establishment. However, Taylor (1979, p. 707) emphasized that human disturbance, which is often associated with these artificial lek sites, is detrimental during the breeding season and did not encourage construction of potential lek sites in areas subject to human disturbance. Giesen (1998, p. 9) reported that hens usually nest and rear broods within 3.4 km (1.7 mi) of leks and may return to nest in areas of previously successful nests (Riley 1978, p. 36). Giesen (1994a, pp. 97–98) and Hagen and Giesen (2005, unpaginated) also reported that hens often nest closer to a lek other than the one on which they mated.

Typical nesting habitat can be described as native rangeland, although there is some evidence that the height and density of forbs (broad-leaved herb other than a grass) and residual grasses is greater at nesting locations than on adjacent rangeland (Giesen 1998, p. 9). Nests are often located on north and northeast facing slopes as protection from direct sunlight and the prevailing southwest winds (Giesen 1998, p. 9). Giesen (1998, p. 9) reports that habitat used by young is similar to that of adults, and the daily movement of the broods is usually 300 m (984 ft) or less. After the broods break up, the juveniles form mixed flocks with adult birds (Giesen 1998, p. 9), and juvenile habitat use is similar to that of adult birds. Giesen (1998, p. 4) reports that wintering habitat is similar to that used for breeding with the exception that small grain fields are used more heavily during this period than during the breeding season. Habitats used by broods had greater total biomass of invertebrates and forb cover than areas not frequented by broods in Kansas, emphasizing the importance of forbs in providing the invertebrate populations used by young lesser prairie-chickens (Jamison *et al.* 2002, pp. 520, 524).

Home range and dispersal distances of lesser prairie-chickens are indicative of their requirement for large blocks of interconnected, ecologically diverse native grassland. As reported by Giesen (1998, p. 11) and Taylor and Guthery (1980b, p. 522), a single lesser prairie-chicken may have a home range (geographic area to which an organism typically confines its activity) of 211 ha (512 ac) to 1,945 ha (4,806 ac). More recently, studies in Kansas demonstrated some birds may move as much as 50 km (31 mi) from their point of capture (Hagen *et al.* 2004, p. 71). While some overlap in home ranges is

expected, rarely would those home ranges overlap completely due to competition for space, food, and other resources. Taylor and Guthery (1980a, p. 11) used lesser prairie-chicken movements in west Texas to estimate the area needed to meet the minimum requirements of a lek population. A contiguous area of suitable habitat encompassing at least 32 sq km (12 sq mi or 7,900 ac) would support about 90 percent of the annual activity associated with a given lek and an area of 72 sq km (28 sq mi or 17,791 ac) would include all of the annual activity associated with a lek except for some movements of juveniles (Taylor and Guthery (1980a, p. 11). Bidwell *et al.* (2002. p. 3) conclude that at least 101.2 sq km (39 sq mi or 25,000 ac) of contiguous high-quality habitat is needed to maintain a sustainable population of lesser prairie-chickens. Because lesser prairie-chickens typically nest and rear their broods in proximity to a lek other than the one used for mating (Giesen 1998, p. 9), a complex of two or more leks is likely the very minimum required to sustain a viable lesser prairie-chicken population. Hagen *et al.* (2004, p. 76) recommended that lesser prairie-chicken management areas be at least 4,096 sq km (1,581 sq mi or 1,012,140 ac) in size. Management areas of this size would incorporate the longest-known movements of individual birds and be large enough to maintain healthy lesser prairie-chicken populations despite the presence of potentially large areas of unsuitable habitat.

Historical Range and Distribution

Prior to description by Ridgeway in 1885, most observers did not differentiate between the lesser and greater prairie-chicken. Consequently, estimating historical abundance and occupied range is difficult. Historically, the lesser prairie-chicken is known to have occupied native rangeland in portions of southeastern Colorado (Giesen 1994b, pp. 175–182), southwestern Kansas (Baker 1953, p. 9; Schwilling 1955, p. 10), western Oklahoma (Duck and Fletcher 1944, p. 68), the Texas panhandle (Henika 1940, p. 15; Oberholser 1974, p. 268), and eastern New Mexico (Ligon 1927, pp. 123–127).

Lesser prairie-chickens also have been documented from Nebraska, based on at least four specimens known to have been collected near Danbury in Red Willow County during the 1920s (Sharpe 1968, p. 50). Sharpe (1968, pp. 51, 174) considered the occurrence of lesser prairie-chickens in Nebraska to be the result of a short-lived range expansion facilitated by settlement and cultivation of grain crops. Lesser prairie-chickens are not currently believed to occur in Nebraska. Sharpe did not report any confirmed observations since the 1920s (Sharpe 1968, entire), and no sightings have been documented despite searches over the last 5 years in southwestern Nebraska (Walker 2011). Therefore, Nebraska is generally considered outside the historical range of the species.

Based on a single source, Crawford (1974, p. 4) reported that the lesser prairie-chicken was successfully introduced to the island of Niihau in the State of Hawaii. Prairie-chickens were known to have been released on Niihau, a privately owned island, in 1934 (Fisher 1951, p. 37), but the taxonomic identity of those birds has not ever been confirmed. Schwartz and Schwartz (1949, p. 120) believed that these birds were indeed lesser prairie-chickens. Fisher and members of his expedition did observe at least eight individual prairie-chickens during a visit to Niihau in 1947, but no specimens were collected due to their scarcity and the landowner's requests (Fisher 1951, pp. 33–34, 37). Consequently, the specific identity of these birds could not be confirmed, and their current status on the island remains unknown (Pratt *et al.* 1987, p. 324; Pyle and Pyle 2009, p. 5). Similarly, Jeschke and Strayer (2008, p. 127) indicate that both lesser and greater prairie-chickens were introduced to parts of Europe, but both species failed to become established there. Although we do not believe that either greater or lesser prairie-chickens still persist in Hawaii or Europe, we request that any recent information on the status of lesser prairie-chickens in either Hawaii or Europe be provided to us during the comment period.

Johnsgard (2002, p. 32) estimated the maximum historical range of the lesser prairie-chicken to have encompassed some 260,000 to 388,500 sq km (100,000 to 150,000 sq mi), with about two-thirds of the historical range occurring in Texas. Taylor and Guthery (1980a, p. 1, based on Aldrich 1963, p. 537) estimated that, by the 1880s, the area occupied by lesser prairie-chicken was about 358,000 sq km (138,225 sq mi), and, by 1969, they estimated the occupied range had declined to roughly 125,000 sq km (48,263 sq mi) due to widespread conversion of native prairie to cultivated cropland. Taylor and Cuthery (1980a, p. 4) estimated that, by 1980, the occupied range encompassed only 27,300 sq km (10,541 sq mi), representing a 90 to 93 percent reduction in occupied range since pre-European settlement and a 92 percent reduction in the occupied range since the 1880s.

In 2007, cooperative mapping efforts by species experts from the Colorado Parks and Wildlife (CPW) (formerly Colorado Division of Wildlife), Kansas Department of Wildlife, Parks and Tourism (KDWPT) (formerly Kansas Department of Wildlife and Parks), New Mexico Department of Game and Fish (NMDGF), Oklahoma Department of Wildlife Conservation (ODWC), and Texas Parks and Wildlife Department (TPWD), in cooperation with the Playa Lakes Joint Venture, reestimated the maximum historical and occupied ranges. They determined the maximum occupied range, prior to European settlement, to have been approximately 456,087 sq km (176,096 sq mi) (Playa Lakes Joint Venture 2007, p. 1). The approximate historical range, by State, based on this cooperative mapping effort is the following: 21,911 sq km (8,460 sq mi) in Colorado; 76,757 sq km (29,636 sq mi) in Kansas; 52,571 sq km (20,298 sq mi) in New Mexico; 68,452 sq km (26,430 sq mi) in Oklahoma; and 236,396 sq km (91,273 sq mi) in Texas. Since 2007, the CPW slightly expanded the historical range in Colorado, based on new information. The total maximum historically occupied range, based on this adjustment, is now estimated to be about 466,998 sq km (180,309 sq mi).

Current Range and Distribution

The lesser prairie-chicken still occurs within the States of Colorado, Kansas, New Mexico, Oklahoma, and Texas (Giesen 1998, p. 3). During the 2007 mapping effort (Playa Lakes Joint Venture 2007, p. 1; Davis *et al.* 2008, p 19), the State conservation agencies estimated the current occupied range encompassed 65,012 sq km (25,101 sq mi). The approximate occupied range, by State, based on this cooperative mapping effort is 4,216 sq km (1,628 sq mi) in Colorado; 29,130 sq km (11,247 sq mi) in Kansas; 8,570 sq km (3,309 sq mi) in New Mexico; 10,969 sq km (4,235 sq mi) in Oklahoma; and 12,126 sq km (4,682 sq mi) in Texas.

Since 2007, the occupied and historical range in Colorado and the occupied range in Kansas have been adjusted to reflect new information. The currently occupied range in Colorado is now estimated to be 4,456 sq km (1,720 sq mi), and, in Kansas, the lesser prairie-chicken is now thought to occupy about 34,479 sq km (13,312 sq mi). In Kansas, the adjustment was due to expansion of lesser prairie-chicken populations in Ellis, Graham, Sheridan, and Trego Counties. The total estimated occupied range is now believed to encompass

some 70,601 sq km (27,259 sq mi). The currently occupied range now represents roughly 16 percent of the revised historical range. This value is a close approximation because a small portion of the expanded range in Kansas lies outside the estimated maximum historical range and was not included in this analysis. Considering there are historical records from Nebraska, the maximum historical range currently in use is likely smaller than the maximum that would exist if the temporarily occupied range in Nebraska was included in the analysis.

The overall distribution of lesser prairie-chicken within all States except Kansas has declined sharply, and the species is generally restricted to variously sized, often highly fragmented parcels of untilled native rangeland (Taylor and Guthery 1980a, pp. 2–5) or areas with significant CRP enrollments that were initially seeded with native grasses (Rodgers and Hoffman 2005, pp. 122–123). The estimated current occupied range, based on cooperative mapping efforts described above, and as derived from calculations of the area of each mapped polygon using geographical information software, represents about an 84 percent reduction in overall occupied range since pre-European settlement.

TABLE 1—ESTIMATED HISTORICAL AND CURRENT OCCUPIED LESSER PRAIRIE-CHICKEN RANGE BY STATE

State	Historical range	Current range	Extent	
			Historical	Current
Colorado	6 counties	4 counties	21,910.9 sq km (8,459.8 sq mi)	4,216.5 sq km (1,628.0 sq mi)
Kansas	38 counties	35 counties	76,757.4 sq km (29,636.2 sq mi)	29,130.2 sq km (11,247.2 sq mi)
New Mexico	12 counties	7 counties	52,571.2 sq km (20,297.9 sq mi)	8,570.1 sq km (3,308.9 sq mi)
Oklahoma	22 counties	8 counties	68,452.1 sq km (26,429.5 sq mi)	10,969.1 sq km (4,235.2 sq mi)
Texas	34 counties (1940s–50s)	13 counties*	236,396.2 sq km (91,273.1 sq mi)	12,126.5 sq km (4,682.1 sq mi)
TOTAL	107 counties	67 counties	456,087.8 sq km (176,096.5 sq mi)	65,012.4 sq km (25,101.4 sq mi)

*Timmer (2012, p. 36) only observed lesser prairie-chickens in 12 counties.

Population Estimates

Very little information is available regarding the size of lesser prairie-chicken populations prior to 1900. Once the five States supporting lesser prairie-chickens were officially opened for settlement beginning in the late 1800s, settlement occurred quickly and the landscape began to change rapidly. Numbers of lesser prairie-chickens likely changed rapidly as well. Despite the lack of conclusive information on population size, the lesser prairie-chicken was reportedly quite common throughout its range in Colorado, Kansas, New Mexico, Oklahoma, and Texas in the early twentieth century (Bent 1932, pp. 280–281,283; Baker 1953, p. 8; Bailey and Niedrach 1965, p. 51; Sands 1968, p. 454; Fleharty 1995, pp. 38–44; Robb and Schroeder 2005, p. 13). Litton (1978, p. 1) suggested that as many as two million birds may have occurred in Texas alone prior to 1900. By the 1930s, the species had begun to disappear from areas where it had been considered abundant, and the decline was attributed to extensive cultivation, overgrazing by livestock, and drought (Bent 1932, p. 280). Populations were nearly extirpated from Colorado, Kansas, and New Mexico, and were markedly reduced in Oklahoma and Texas (Baker 1953, p. 8; Crawford 1980, p. 2).

Rangewide estimates of population size were almost nonexistent until the 1960s and likely corresponded with more frequent and consistent efforts by the States to monitor lesser prairie-chicken populations. Although lesser prairie-chicken populations can fluctuate considerably from year to year in response to variable weather and habitat conditions, generally the overall population size has continued to decline from the estimates of population size available in the early 1900s (Robb and Schroeder 2005, p. 13). By the mid-1960s, Johnsgard (1973, p. 281) estimated the total rangewide population to be between 36,000 and 43,000 individuals. In 1980, the estimated rangewide fall population size was thought to be between 44,400 and 52,900 birds (Crawford 1980, p. 3). Population size in the fall is likely to be larger than population estimates derived from spring counts due to recruitment that occurs following the nesting season. By 2003, the estimated total rangewide population was 32,000 birds, based on information provided by the Lesser Prairie-Chicken Working Group (Rich *et al.* 2004, unpaginated). Prior to the implementation of a rangewide survey effort in 2012, the best available population estimates indicate that the lesser prairie-chicken population likely would be approximately 45,000 birds or less (see Table 2). This estimate is a rough approximation of the maximum population size and should not be considered as the actual current population size. Although the estimate uses the most current information available, population estimates for some States have not been determined in several years and reported values may not represent actual population sizes. For example, the values reported for Colorado and Oklahoma were published in 2000 and recent estimates of total population size for these States have not been determined. The aerial surveys conducted in 2012, as explained below, provide the best estimate of current population size.

TABLE 2—RECENT POPULATION ESTIMATES PRIOR TO 2012 BY STATE

State	Recent population estimates prior to 2012
Colorado	<1,500 (in 2000)
Kansas	19,700–31,100 (in 2006)
New Mexico	6,130 (in 2011)
Oklahoma	<3,000 (in 2000)
Texas	1,254–2,649 (in 2010–11)
TOTAL	<45,000

In the spring (March 30 to May 3) of 2012, the States, in conjunction with the Western Association of Fish and Wildlife Agencies, implemented a rangewide sampling framework and survey methodology using small aircraft. This aerial survey protocol was developed to provide a more consistent approach for detecting rangewide trends in lesser prairie-chicken population abundance across the occupied range. The goal of this survey was to estimate the abundance of active leks and provide information that could be used to detect trends in lek abundance over time. The sampling framework used 15-by-15-km (9-by-9-mi) grid cells overlapping the estimated occupied range, as existed in 2011, plus a 7.5-km (4.6-mi) buffer. Additional information on the survey approach is provided in McDonald *et al.* 2011, entire. Another survey is planned for the spring of 2013, provided funding is available. We intend to incorporate those results, subject to availability, into our final determination.

The aerial survey study area was divided into four regions that encompassed the estimated occupied range of the lesser prairie-chicken. These regions were delineated based on habitat type and results grouped by individual State were not provided. The four regional groupings were the Shinnery Oak Prairie Region of eastern New Mexico and southwest Texas; the Sand Sagebrush Prairie Region located in southeastern Colorado, southwestern Kansas, and western Oklahoma Panhandle; the Mixed Grass Prairie Region located in the northeastern Texas panhandle, northwestern Oklahoma, and south-central Kansas; and the Short Grass/CRP Mosaic in northwestern Kansas and eastern Colorado. During surveys of the 264 blocks selected, 40 lesser prairie-chicken leks, 6 mixed leks comprised of both lesser and greater prairie-chickens, and 100 non-lek aggregations of lesser prairie-chickens were observed (McDonald *et al.* 2012, p. 15). For this study, an active lek was defined as having five or more birds per lek. If fewer than five individual birds were observed, ground surveys were conducted of those bird groups to determine if lekking birds were present. If not, those areas were classified as ''non-leks''. After the survey observations were adjusted to account for probability of detection, some 3,174 lesser prairie-chicken leks were estimated to occur over the entire occupied range (McDonald *et al.* 2012, p. 18). Another 441 mixed leks, consisting of both lesser and greater prairie-chickens, were estimated to occur within the occupied range. These mixed leks were limited to the Short Grass/CRP Mosaic region where the range of the two species overlaps. Using the respective average group size, by each identified region, an estimate of the total number of lesser prairie-chickens and lesser/greater prairie-chicken hybrids could be derived (McDonald *et al.* 2012, p. 20). The total estimated abundance of lesser prairie-chickens was 37,170 individuals, with the number of hybrids estimated to be 309 birds (McDonald *et al.* 2012, p. 21). The estimated total number of lesser prairie-chicken leks and population size, by habitat region, are as follows: Shinnery Oak Prairie Region—428 leks and 3,699 birds; Sand Sagebrush Prairie Region—105 leks and 1,299 birds; Mixed Grass Prairie Region—877 leks and 8,444 birds; and the Short Grass/CRP Mosaic Region—1,764 leks and 23,728 birds (McDonald *et al.* 2012, pp. 20, 23).

State-by-State Information on Population Status

Each of the State conservation agencies within the occupied range of the lesser prairie-chicken provided us with information regarding the current status of the lesser prairie-chicken within their respective States, and most of the following information was taken directly from agency reports, memos, and other status documents. Population survey data are collected from spring lek surveys in the form of one or both of the following indices: Average lek size (*i.e.,* number of males or total birds per lek); or density of birds or leks within a given area. Most typically, the data are collected along fixed survey routes where the number of displaying males counted is assumed to be proportional to the population size, or the number of leks documented is assumed to be an index of population size or occupied range. These techniques are useful in evaluating long-term trends and determining occupancy and distribution but are very limited in their usefulness for reliably estimating population size (Johnson and Rowland 2007, pp. 17–20). However, given existing constraints, such as available staff and funding, they provide the best opportunity to assess lesser prairie-chicken populations.

Although each State annually conducts lesser prairie-chicken surveys according to standardized protocols, those protocols vary by State. Thus, each State can provide information relative to lesser prairie-chicken numbers and trends by State, but obtaining consistent information across the entire range is difficult given the current approach to population monitoring. However, in the absence of more reliable estimators of bird density, total counts of active leks over large areas were recommended as the most reliable trend index for prairie grouse populations such as lesser prairie-chickens (Cannon and Knopf 1981, p. 777; Hagen *et al.* 2004, p. 79). About 95 percent of the currently estimated occupied range occurs on privately owned land, as determined using the Protected Areas Database of the United States hosted by the U.S. Geological Survey Gap Analysis Program. This database describes land areas that are under public ownership and the extent of private ownership can be determined by subtracting the amount of public lands from the total land base encompassed by the occupied range.

Colorado—Lesser prairie-chickens were likely resident in six counties (Baca, Bent, Cheyenne, Kiowa, Kit Carson, and Prowers Counties) in Colorado prior to European settlement (Giesen 2000, p. 140). At present, lesser prairie-chickens are known to occupy portions of Baca, Cheyenne, Prowers, and Kiowa Counties, but are not known to persist in Bent and Kit Carson Counties. Present delineated range includes portions of eastern Lincoln County although breeding birds have not been documented from this county. Populations in Kiowa and Cheyenne Counties number fewer than 100 individuals and appear to be isolated from other populations in Colorado and adjacent States (Giesen 2000, p. 144). The lesser prairie-chicken has been State-listed as threatened in Colorado since 1973. Colorado Department of Wildlife (now CPW) estimated 800 to 1,000 lesser prairie-chicken in the State in 1997. Giesen (2000, p. 137) estimated the population size, as of 2000, to be fewer than 1,500 breeding individuals.

CPW has been monitoring leks annually since 1959, primarily by using standard survey routes (Hoffman 1963, p. 729). A new survey method was initiated in 2004, designed to cover a much broader range of habitat types and a larger geographic area, particularly to include lands enrolled in the CRP. The new methodology resulted in the discovery of more leks and the documented use of CRP fields by lesser prairie-chickens in Colorado. In 2011, CPW used aerial surveys in addition to the more traditional ground surveys in an attempt to identify new leks in Cheyenne County (Remington 2011).

A total count of 161 birds and 17 active leks were detected in 2011 (Verquer and Smith 2011, pp. 1–2). A lek is considered active when at least three males are observed displaying on

the lek. There were six active leks in Baca County, nine active leks in Prowers County, and two active leks in Cheyenne County. No active leks were detected in Kiowa County although leks have been active in this county as recently as 2008 (Verquer 2008, p. 1). No new active leks were detected in Cheyenne County. Habitat provided by CRP continues to be very important to persistence of birds in Prowers County.

Since 1977, the total number of birds observed during routine survey efforts has varied from a high of 448 birds in 1990 to a low of 74 birds in 2007. The general population trajectory, based on number of birds observed on active leks during the breeding season is declining, excluding information from 1992 when limited survey data were collected. The number of active leks remained fairly stable between 1999 and 2006. During this period, the highest number of active leks recorded, 34, occurred in 2004 and again in 2006. The fewest number of active leks observed occurred in 2002 when 24 leks were observed. The average number of active leks observed between 1999 and 2006 was 30.1.

Beginning in 2007 and continuing to present, the number of active leks observed has remained fairly stable. Since 2007, the highest recorded number of active leks was 18, which occurred in 2007. The fewest number of active leks observed was 13 recorded in 2009. The average number of active leks over this period was 16.4, roughly half of the average number of active leks (30) observed during the period between 1999 and 2006. Drought conditions observed in 2006, followed by severe winter weather, probably account for the decline in the number of lesser prairie-chickens observed in 2007 (Verquer 2007, pp. 2–3). In the winter of 2006–2007, heavy snowfall severely reduced food and cover in Prowers, southern Kiowa, and most of Baca Counties for over 60 days. Then, in the spring of 2008, nesting and brood rearing conditions were unfavorable due to drought conditions in southeastern Colorado (Verquer 2009, p. 5).

As a complement to CPW surveys, counts are completed on the USFS Comanche National Grassland in Baca County. On the Comanche National Grassland, the estimated area occupied by the lesser prairie-chicken over the past 20 years was approximately 27,373 ha (65,168 ac) (Augustine 2005, p. 2). Surveys conducted during 1984 to 2005 identified 53 different leks on or immediately adjacent to USFS lands. Leks were identified based on the presence of at least three birds on the lek. Lek censuses conducted from 1980 to 2005 showed the number of males counted per lek since 1989 has steadily declined (Augustine 2006, p. 4). The corresponding population estimate, based on number of males observed at leks, on the Comanche National Grassland was highest in 1988 with 348 birds and lowest in 2005 with approximately 64 birds and only 8 active leks (Augustine 2006, p. 4). The estimate of males per lek in 2005 declined more than 80 percent from that of 1988, from 174 males per lek to 32 males per lek, respectively. In 2009, each historical lek was surveyed 2 to 3 times, and 4 active leks were observed (Shively 2009b, p. 1). A high count of 25 males was observed using these four leks. In the spring of 2008, five active leks and 34 birds were observed (Shively 2009a, p. 3).

Kansas—In the early part of the last century, lesser prairie-chicken historical range included all or part of 38 counties, but by 1977, the species was known to exist in only 17 counties, all located south of the Arkansas River (Waddell and Hanzlick 1978, pp. 22–23). Since 1999, biologists have documented lesser prairie-chicken expansion and reoccupation of 17 counties north of the Arkansas River, primarily attributable to favorable habitat conditions (*e.g.,* native grasslands) created by implementation of the CRP in those counties. Currently, lesser prairie-chickens occupy approximately 34,479 sq km (13,312 sq mi) within all or portions of 35 counties in western Kansas. Greater prairie-chickens in Kansas also have expanded their range, and, as a result, mixed leks of both lesser prairie-chickens and greater prairie-chickens occur within an overlap zone covering portions of 7 counties (2,500 sq km (965 sq mi)) in western Kansas (Bain and Farley 2002, p. 684). Within this zone, apparent hybridization between lesser prairie-chickens and greater prairie-chickens is now evident (Bain and Farley 2002, p. 684). Two survey routes used by KDWPT are located within this overlap zone; however, hybrids have been observed on only one of those routes. Although hybrid individuals are included in the counts, the number of hybrids observed is typically less than 1 percent, or 2 to 7 birds, of the total number of birds observed on the surveyed areas.

Since inception of standard lesser prairie-chicken survey routes in 1967, the number of standard survey routes has gradually increased. The number of standard routes currently surveyed in Kansas for lesser prairie-chickens is 14 and encompasses an area of 627.5 sq km (242.3 sq mi). Flush counts are taken twice at each lek located during the standard survey routes. An estimated population density is calculated for each route by taking the higher of the two flush counts, doubling that count primarily to account for females, and then dividing the estimated number of birds by the total area surveyed per route. The current statewide trend in lesser prairie-chicken abundance between 2004 and 2009 indicates a declining population (Pitman 2011, p. 15).

In 2006, KDWPT estimated the breeding population of lesser prairie-chickens in the State to be between 19,700 and 31,100 individuals (Rodgers 2007a, p. 1). The total breeding population estimates were derived using the National Gap Analysis Program, where the population indices from each habitat type along 15 survey routes were extrapolated for similar habitat types throughout total occupied lesser prairie-chicken range statewide.

New Mexico—In the 1920s and 1930s, the former range of the lesser prairie-chicken in New Mexico was described as all of the sand hill rangeland of eastern New Mexico, from Texas to Colorado, and as far west as Buchanan in DeBaca County. Ligon (1927, pp. 123–127) mapped the breeding range at that time as encompassing portions of seven counties, a small subset of what he described as former range. Ligon (1927, pp. 123–127) depicted the historical range in New Mexico as encompassing all or portions of 12 counties. In the 1950s and 1960s, occupied range was more extensive than the known occupied range in 1927 (Davis 2005, p. 6), indicating reoccupation of some areas since the late 1920s. Presently, the NMDGF reports that lesser prairie-chickens are known from six counties (Chaves, Curry, DeBaca, Lea, Roosevelt and Quay Counties) and suspected from one additional county (Eddy County). The occupied range of the lesser prairie-chicken in New Mexico is conservatively estimated to encompass approximately 5,698 sq km (2,200 sq mi) (Davis 2006, p. 7) compared with its historical range of 22,390 sq km (8,645 sq mi). Based on the cooperative mapping efforts conducted by the Playa Lakes Joint Venture and the Lesser Prairie-Chicken Interstate Working Group, occupied range in New Mexico was estimated to be 8,570 sq km (3,309 sq mi), considerably larger than the conservative estimate used by Davis (2006, p. 7). One possible reason for the difference in occupied range is that Davis (2006, p. 7) did not consider the known distribution to encompass any portion of Eddy County or southern Lea County. Approximately 59 percent of the historical lesser prairie-chicken

range in New Mexico is privately held, with the remaining historical and occupied range occurring on lands managed by the BLM, USFS, and New Mexico State Land Office (Davis 2005, p. 12).

In the 1950s, the lesser prairie-chicken population was estimated at 40,000 to 50,000 individuals, but, by 1968, the population had declined to an estimated 8,000 to 10,000 individuals (Sands 1968, p. 456). Johnsgard (2002, p. 51) estimated the number of lesser prairie-chickens in New Mexico at fewer than 1,000 individuals by 2001. Similarly, the Sutton Center estimated the New Mexico lesser prairie-chicken population to number between 1,500 and 3,000 individuals, based on observations made over a 7-year period (Wolfe 2008). Using lek survey data, NMDGF currently estimates the statewide lesser prairie-chicken population to be about 6,130 birds (Beauprez 2011, p. 22). Based on the estimated population sizes in New Mexico since 2001, the population appears to be increasing slightly (Beauprez 2011, p. 22). Longer term trends are not available as roadside listening routes did not become established until 1998. Prior to that date, counts were conducted on some of the NMDGF Prairie-Chicken Areas or on lands under the jurisdiction of the BLM. The current roadside survey uses 29 standard routes established since 1999, 10 additional routes established in 2003 within the northeastern part of lesser prairie-chicken historical range, and 41 routes randomly selected from within the 382 townships located within the survey boundary.

Since initiating the 10 additional northeastern routes in 2003, NMDGF reports that no leks have been detected in northeastern New Mexico. Results provide strong evidence that lesser prairie-chickens no longer occupy their historical range within Union, Harding, and portions of northern Quay Counties (Beauprez 2009, p. 8). However, a solitary male lesser prairie-chicken was observed and photographed in northeastern New Mexico by a local wildlife law enforcement agent in December 2007. Habitat in northeastern New Mexico appears capable of supporting lesser prairie-chicken, but the lack of any known leks in this region since 2003 suggests that lesser prairie-chicken populations in northeastern New Mexico, if still present, are very small.

The core of occupied lesser prairie-chicken range in this State lies in east-central New Mexico (Chaves, Curry, DeBaca, Lea, and Roosevelt Counties). Populations in southeastern New Mexico, defined as the area south of U.S. Highway 380, remain low and continue to decline. The majority of historically occupied lesser prairie-chicken habitat in southeastern New Mexico occurs primarily on BLM land. Snyder (1967, p. 121) suggested that this region is only marginally populated except during favorable climatic periods. Best *et al.* (2003, p. 232) concluded anthropogenic factors have, in part, rendered lesser prairie-chicken habitat south of U.S. Highway 380 inhospitable for long-term survival of lesser prairie-chickens in southeastern New Mexico. Similarly, NMDGF suggests that habitat quality likely limits recovery of populations in southeastern New Mexico (Beauprez 2009, p. 13).

The New Mexico State Game Commission owns and manages 29 Prairie-chicken Areas ranging in size from 10 to 3,171 ha (29 to 7,800 ac) within the core of occupied range in east central New Mexico. These Prairie-chicken Areas total 109 sq km (42 sq mi), or roughly 1.6 percent of the total occupied lesser prairie-chicken range in New Mexico. Instead of the typical roadside counts, the NMDGF conducts ''saturation'' surveys on each individual Prairie-chicken Area to determine the presence of lesser prairie-chicken leks and individual birds over the entire Prairie-chicken Area (Beauprez 2009, p. 7). Adjacent lands are included within these surveys, including other State Trust Lands, some adjacent BLM lands, and adjacent private lands. The Prairie-chicken Areas are important to persistence of the lesser prairie-chicken in New Mexico. However, considering the overall areal extent of the Prairie-chicken Areas and that many Prairie-chicken Areas are small and isolated, continued management of the surrounding private and Federal lands is integral to viability of the lesser prairie-chicken in New Mexico.

Oklahoma—Lesser prairie-chickens historically occurred in 22 Oklahoma counties. By 1961, Copelin (1963, p. 53) reported lesser prairie-chickens from only 12 counties. By 1979, lesser prairie-chickens were verified in eight counties, and the remaining population fragments encompassed an estimated area totaling 2,792 sq km (1,078 sq mi), a decrease of approximately 72 percent since 1944. At present, the ODWC reports lesser prairie-chickens continue to persist in eight counties with an estimated occupied range of approximately 950 sq km (367 sq mi). Horton (2000, p. 189) estimated the entire Oklahoma lesser prairie-chicken population numbered fewer than 3,000 birds in 2000. A more recent estimate has not been conducted.

The ODWC is aware of 96 known historical and currently active leks in Oklahoma. During the mid-1990s, all of these leks were active. Survey efforts to document the number of active leks over the occupied range have recently been completed, but the results are currently unavailable.

The number of roadside listening routes currently surveyed annually in Oklahoma has varied from five to seven over the last 20 years, and counts of the number of males per lek have been conducted since 1968. Beginning with the 2002 survey, male counts at leks were replaced with flush counts, which did not differentiate between the sexes of birds flushed from the surveyed lek (ODWC 2007, pp. 2, 6). Comparing the total number of males observed during survey efforts between the years 1977 through 2001 reveals a declining trend. However, examination of the overall density of leks (number per sq mi), another means of evaluating population status of lesser prairie-chickens, over five of the standard routes since 1985 is stable to slightly declining. Information on lek density prior to 1985 was unavailable. The standard route in Roger Mills County was not included in this analysis because the lek was rarely active and has not been surveyed since 1994. A survey route in Woods County was included in the analysis even though surveys on this route did not begin until 2001. However, excluding the Woods County route did not alter the apparent trend. The average lek density since 2001 is 0.068 leks per sq mi (Schoeling 2010, p. 3). Between 1985 and 2000, the average lek density was 0.185 leks per sq mi, when the route in Roger Mills County is excluded from the analysis. Over the last 10 years, the density of active leks has varied from a low of 0.02 leks per sq km (0.05 leks per sq mi) in 2004, 2006, and 2009, to a high of 0.03 leks per sq km (0.09 leks per sq mi) in 2005 and 2007 (Schoeling 2010, p. 3).

Texas—Systematic surveys to identify Texas counties inhabited by lesser prairie-chickens began in 1940 (Henika 1940, p. 4). From the early 1940s (Henika 1940, p. 15; Sullivan *et al.* 2000) to mid-1940s (Litton 1978, pp. 11–12), to the early 1950s (Seyffert 2001, pp. 108–112), the range of the lesser prairie-chicken in Texas was estimated to encompass all or portions of 34 counties. Species experts considered the occupied range at that time to be a reduction from the presettlement range. By 1989, TPWD estimated occupied range encompassed all or portions of only 12 counties (Sullivan *et al.* 2000, p. 179). In 2005, TPWD reported that the number of

occupied counties likely has not changed since the 1989 estimate. In March 2007, TPWD reported that lesser prairie-chickens were confirmed from portions of 13 counties (Ochiltree, Lipscomb, Roberts, Hemphill, Gray, Wheeler, Donley, Bailey, Lamb, Cochran, Hockley, Yoakum, and Terry Counties) and suspected in portions of another eight counties (Moore, Carson, Oldham, Deaf Smith, Randall, Swisher, Gaines, and Andrews Counties).

Based on recent aerial and road surveys conducted in 2010 and 2011, new leks were detected in Bailey, Cochran, Ochiltree, Roberts, and Yoakum Counties, expanding the estimated occupied ranges in those counties (TPWD 2011). However, no lesser prairie-chickens were detected in Andrews, Carson, Deaf Smith, Oldham, or Randall Counties. Active leks were reported from the same 13 counties identified in 2007. However, in 2012, Timmer (2012, pp. 36, 125–131) only observed lesser prairie-chickens from 12 counties: Bailey, Cochran, Deaf Smith, Donley, Gray, Hemphill, Lipscomb, Ochiltree, Roberts, Terry, Wheeler, and Yoakum. Lesser prairie-chicken populations in Texas primarily persist in two disjunctive regions—the Permian Basin/Western Panhandle region and the Northeastern Panhandle region.

Maximum occupied range in Texas, as of September 2007, was estimated to be 12,787 sq km (4,937.1 sq mi), based on habitat conditions in 20 panhandle counties (Davis *et al.* 2008, p. 23). Conservatively, based on those portions of the 13 counties where lesser prairie-chickens are known to persist, the area occupied by lesser prairie-chickens in Texas is 7,234.2 sq km (2,793.1 sq mi). Using an estimated mean density of 0.0088 lesser prairie-chickens per ac (range 0.0034–0.0135 lesser prairie-chickens per ac), the Texas population is estimated at a mean of 15,730 individuals in the 13 counties where lesser prairie-chickens are known to occur (Davis *et al.* 2008, p. 24).

Since 2007, Texas has been evaluating the usefulness of aerial surveys as a means of detecting leks and counting the number of birds attending the identified lek (McRoberts 2009, pp. 9–10). Initial efforts focused on measuring lek detectability and assessing the response of lekking birds to disturbance from survey aircraft. More recently, scientists at Texas Tech University used aerial surveys to estimate the density of lesser prairie-chicken leks and statewide abundance of lesser prairie-chickens in Texas. This study conducted an inventory of 208 survey blocks measuring 7.2 by 7.2 km (4.5 by 4.5 mi), encompassing some 87 percent of the occupied range in Texas during the spring of 2010 and 2011 (Timmer 2012, pp. 26–27, 33). Timmer (2012, p. 34) estimated 2.0 leks per 100 sq km (0.02 leks per sq km). Previously reported estimates of rangewide average lek density varied from 0.10 to 0.43 leks per sq km (Davison 1940, Sell 1979, Giesen 1991, Locke 1992 as cited in Hagen and Giesen 2005, unpaginated). The total estimate of the number of leks was 293.6 and, based on the estimated number of birds observed using leks, the statewide population was determined to be 1,822.4 lesser prairie-chickens (Timmer 2012, p. 34).

Recent Trends

In June 2012, we were provided with an interim assessment of lesser prairie-chicken population trends since 1997 (Hagen 2012, entire). The objective of this analysis was to provide an evaluation of recent lesser prairie-chicken population trends both rangewide and within the four primary habitat types (CRP-shortgrass prairie dominated landscape, mixed grass prairie landscape, sand sagebrush prairie landscape, and shinnery oak landscape) that encompass the occupied range of the species. The analysis employed modeling techniques intended to provide a more unified assessment of population trends, considering that each State uses slightly different methods to monitor lesser prairie-chickens and that sampling effort has varied over time, with sampling efforts typically increasing in recent years. The results of this analysis suggest that lesser prairie-chicken population trends have increased since 1997.

However, we are reluctant to place considerable weight on this interim assessment for several reasons. First, and perhaps most important, is that the analysis we were provided is a preliminary product. We anticipate that a more complete, and perhaps peer-reviewed, product would be submitted during the comment period on this proposed rule. Second, we have concerns with the differences in how lek counts are conducted and how those differences were addressed. For example, when the States conduct flush counts at the leks, all of the States, except Oklahoma, count the number of males flushed from the lek. However, since 1999, Oklahoma has counted all birds flushed from the lek and did not differentiate between males and females. Additionally, some of the States use numbers derived from lek counts conducted over large areas rather than road side listening routes. We are unsure how these differences in sampling methodology would influence the pooled trend information presented, particularly for large geographical areas where two different sampling methods are used in the analysis. Third, the trend information presents only information gathered since 1997 or more recently, without considering historical survey information. The trends evident from sampling efforts since 1997 likely reflect increased sampling effort following publication of the 12-month finding, and increased sampling effort could lead to biased results. In some instances, sampling methodology by agency likely varied between years during this time period as access to some study areas was restricted and new areas were established in their place. For example, in southwest Texas, two study areas were used until 1999, when an additional sampling area in Yoakum County was added. Then in 2007, the original Gaines County study area was dropped and a new, smaller Gaines County study area was established to replace the original study area. Similar changes occurred in the northeastern panhandle of Texas where a new study area in Gray County was added in 1998. These changes in sampling location can confound efforts to make comparisons between years. An explanation regarding how these changes were addressed in the assessment would be helpful.

We also recognize the limitations of using lek counts to derive population trends over large areas (see Johnson and Rowland 2007, pp. 17–20). Consequently, we cautioned against using available data from lek counts to derive rangewide population trends for similar reasons. Such analyses can be misleading. However, information on historical and recent lesser prairie-chicken population trends over large geographical areas would improve our analysis of the status of the species and we support efforts to provide a reliable, accurate analysis of rangewide population trends, particularly if those analytical methods are repeatable over time.

Summary of Status Information

Lesser prairie-chicken populations are distributed over a relatively large area, and these populations can fluctuate considerably from year to year, a natural response to variable weather and habitat conditions. Changes in lesser prairie-chicken breeding populations may be indicated by a change in the number of birds attending a lek (lek size), the number of active leks, or both. Although each State conducts standard surveys for lesser prairie-chickens, the application of survey methods and effort

varies by State. Such factors complicate interpretation of population indices for the lesser prairie-chicken and may not reliably represent actual populations. Caution should be used in evaluating population trajectories, particularly short-term trends. In some instances, short-term analyses could reveal statistically significant changes from one year to the next but actually represent a stable population when evaluated over longer periods of time. For example, increased attendance of males at leks may be evident while the number of active leks actually declined. Some recent survey indices indicate that population trends might be stabilizing. However, the numbers of lesser prairie-chickens reported per lek are considerably less than the numbers of birds reported during the 1970s. Population indices appear to have exhibited a steeper decline during these earlier periods than is apparent in recent years. Observed lek attendance at many leks is low, likely due to reduced population sizes. Where lek attendance is low, it is unlikely that populations will recover to historical levels. Estimates of historical population size also can be unreliable and lead to inaccurate inferences about the populations of interest. However, the loss and alteration, including fragmentation, of lesser prairie-chicken habitat throughout its historical range over the past several decades is apparent and likely is more indicative of the status of the lesser prairie-chicken.

Summary of Factors Affecting the Species

The Act defines an endangered species as any species that is ''in danger of extinction throughout all or a significant portion of its range'' and a threatened species as any species ''that is likely to become endangered throughout all or a significant portion of its range within the foreseeable future.'' Thus, a species may be listed as a threatened species if it is likely to qualify for endangered status in the foreseeable future, or in other words, likely to become ''in danger of extinction'' within the foreseeable future. The Act does not define the term ''foreseeable future.'' However, in a January 16, 2009, memorandum addressed to the Acting Director of the Service, the Office of the Solicitor, Department of the Interior, concluded, ''* * * as used in the [Act], Congress intended the term 'foreseeable future' to describe the extent to which the Secretary can reasonably rely on predictions about the future in making determinations about the future conservation status of the species (M–37021, January 16, 2009).''

In considering the foreseeable future as it relates to the status of the lesser prairie-chicken, we considered the factors acting on the species and looked to see if reliable predictions about the status of the species in response to those factors could be drawn. We considered the historical data to identify any relevant existing trends that might allow for reliable prediction of the future (in the form of extrapolating the trends). We also considered whether we could reliably predict any future events that might affect the status of the species, recognizing that our ability to make reliable predictions into the future is limited by the variable quantity and quality of available data.

Under section 4(a)(1) of the Act, we determine whether a species is an endangered or threatened species because of any of the following five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence. Listing actions may be warranted based on any of the above threat factors, singly or in combination.

After a review of the best available scientific information as it relates to the status of the species and the five listing factors described above, we have determined that the lesser prairie-chicken meets the definition of a threatened species (*i.e.,* is likely to become in danger of extinction in the foreseeable future throughout all or a significant portion of its range). Following, we present a very brief explanation of the rationale leading to this conclusion followed by an in-depth discussion of the best available scientific information.

The range of the lesser prairie-chicken has been reduced by an estimated 84 percent (see discussion above in ''Current Range and Distribution''). The primary factor responsible for the range contraction is habitat fragmentation due to a variety of mechanisms that contribute to habitat loss and alteration. This habitat loss is a significant threat to the lesser prairie-chicken because the species requires large parcels of intact native grassland and shrubland to maintain self-sustaining populations. Further, the life history of the species, primarily its lek breeding system and behavioral avoidance of vertical structures that increase predation risk, make it especially vulnerable to ongoing impacts on the landscape, especially at its currently reduced numbers. Finally, due to its reduced population size and ongoing habitat loss and degradation, the species lacks sufficient redundancy and resiliency to recover from present and future impacts. While the current status of the lesser prairie-chicken has been substantially compromised by historical and current threats, there appear to be sufficient stable populations to ensure the persistence of the species over the near term. Therefore, as a result of continued population declines predicted into the foreseeable future, the species is likely to become in danger of extinction in the foreseeable future.

Following, we present our analysis of the best available information that has led us to this conclusion.

Habitat Fragmentation

Spatial habitat fragmentation occurs when some form of disturbance, usually habitat alteration or loss, results in the separation or splitting apart of larger, previously contiguous, functional components of habitat into smaller, often less valuable, noncontiguous parcels (Wilcove *et al.* 1986, p. 237; Johnson and Igl 2001, p. 25; Franklin *et al.* 2002, entire). Fragmentation influences habitat availability in three primary ways: total area of available habitat; size of habitat patches, including edge effects; and patch isolation (Johnson and Igl 2001, p. 25; Stephens *et al.* 2003, p. 101). Initially, reduction in the total area of available habitat (*i.e.,* habitat loss) may be more significant than fragmentation and can exert a much greater effect of extinction (Fahrig (1997, pp. 607, 609). However, as habitat loss continues, the effects of fragmentation often compound effects of habitat loss and produce even greater population declines than habitat loss alone (Bender *et al.* 1998, pp. 517–518, 525). At the point where some or all of the remaining habitat fragments or patches are below some minimum required size, the impact of additional habitat loss, when it consists of inadequately sized parcels, is minimal (Herkert 1994, p. 467). In essence, once a block of suitable habitat becomes so fragmented that the size of the remaining patches become biologically unsuitable, further habitat loss, when it consists of these unusable patches, is of little further consequence to the organism (Bender *et al.* 1998, p. 525).

Both habitat loss and fragmentation correlate with an ecological concept known as carrying capacity. Within any given block or patch of habitat, carrying capacity is the maximum number of organisms that can be supported

indefinitely within that area, provided sufficient food, space, water, and other necessities are available, without causing degradation of the habitat within that patch. Theoretically, as habitat loss increases and the size of an area shrinks, the maximum number of individuals that could inhabit that particular habitat patch also would decline. Consequently, a reduction in the total area of available habitat can negatively influence biologically important characteristics such as the amount of space available for establishing territories and nest sites (Fahrig 1997, p. 603). Over time, the continued conversion and loss of habitats to other land uses will reduce the ability of the land to support historical population levels, causing a decline in population sizes. Where the ability to effect restoration of these habitats is lost, the observed reduction in fish or wildlife populations is likely to be permanent. Within the United States, habitat loss and degradation were found to have contributed to the endangerment of 85 percent of the species listed either as imperiled by The Nature Conservancy or protected under the Act, at the time of their study (Wilcove *et al.* 1998, p. 609).

Fragmentation not only contributes to overall habitat loss but also causes a reduction in the size of individual habitat patches and influences the proximity of these patches to other patches of similar habitat (Stephens *et al.* 2003, p. 101; Fletcher 2005, p. 342). Habitat quality within a fragment may decline as the size of the fragment declines, particularly where habitat quality is a function of fragment size (Franklin *et al.* 2002, p. 23). Fahrig and Merriam (1994, p. 53) reported that both the size and shape of the fragment have been shown to influence population persistence. The size of the fragment can influence reproductive success, survival, and movements. As the distance between habitat fragments increases, dispersal between the habitat patches may cease, impacting population persistence and perhaps even leading to both localized and regional extinctions (Harrison and Bruna 1999, p. 226; With *et al.* 2008, p. 3153).

The proportion of habitat edge to interior habitat increases as the size of a fragment declines. The edge is the transition zone between the original habitat type and the land use that caused fragmentation of the original parcel. In contrast, the core is the area within a fragment that remains intact and is largely or completely uninfluenced by the margin or edge of the fragment. Edge habitat proliferates with increasing fragmentation (Sisk and Battin 2002, p. 31). The response of individual species to the presence of edges varies markedly depending on their tolerance to the edge and the nature of its effects (Sisk and Battin 2002, p. 38). The effects often depend on the degree of contrast between the habitat edge and the adjacent land use matrix. The transition can be abrupt or something more gradual and less harsh. Most typically, edges have been documented to influence movements and survival, particularly for species that use interior or core habitats, serve as points of entry for predators and parasites (such as presence of fences adjacent to grasslands which provide hunting perches for avian predators), alter microclimates, subsidize feeding opportunities (such as providing access to waste grains in cropland areas), and influence species interactions, particularly with cosmopolitan species that tend to be habitat generalists (Sisk and Battin 2002, p. 38).

Fragmentation also can influence the heterogeneity or variation within the resulting fragment. Heterogeneity, in turn, influences the quality of the habitat within the fragment, with more homogeneous fragments generally being less valuable. Grasslands tend to be structurally simple and have little vertical layering. Instead, habitat heterogeneity tends to be largely expressed horizontally rather than vertically (Wiens 1974b, pp. 195–196). Prior to European settlement, the interaction of grazing by wild ungulates and fire created a shifting mosaic of vegetative patches having various composition and structure (Pillsbury *et al.* 2011, p. 2). Under these conditions, many grassland birds distribute their behavioral activities unevenly throughout their territories by nesting in one area, displaying in another, and foraging in still others (Wiens 1974b, p. 208). Lesser prairie-chickens exhibit this pattern and cue in on specific vegetation structure and microenvironment features depending on the specific phase of their life cycle. Consequently, blocks of habitat that collectively or individually encompass multiple successional states that comprise tall grasses and shrubs needed for nesting, and are in proximity to more open grasslands supporting forbs for brood rearing, and are combined with smaller areas of short grass and bare ground used for breeding, support all of the habitat types used by lesser prairie-chickens throughout the year. Considering habitat diversity tends to be greater in larger patches, finding the appropriate mosaic of these features is more likely in larger fragments rather than smaller fragments (Helzer and Jelinski 1999, p. 1456). Such habitat heterogeneity is very different from habitat fragmentation. Habitat fragmentation occurs when the matrix separating the resulting fragments is converted to a use that is not considered habitat whereas habitat heterogeneity implies that patches each having different vegetative structure exist within the same contiguous block of habitat. Habitat heterogeneity may influence habitat quality, but it does not represent fragmentation (Franklin *et al.* 2002, p. 23).

Isolation is another factor that influences suitability of habitat fragments. As habitat loss continues to progress over time, the remnants not only become smaller and more fragmented, they become more isolated from each other. When habitat patches become more isolated and the amount of unusable, unsuitable land use surrounding the islands of habitat increases, even patches of suitable quality and size may no longer be occupied. As fragmentation progresses, the ability of available dispersers to locate suitable fragments will decline. At some point, the amount of intervening unusable and unsuitable land comprising the matrix between the patches grows so wide that it exceeds the organism's dispersal capabilities, rendering the matrix impermeable to dispersal. In such instances, colonizers are unavailable to occupy the otherwise suitable habitat and reestablish connectivity. These patches may remain vacant indefinitely. While extinctions at the local level, and subsequent recolonization of the vacant patch, are common phenomena, recolonization depends on the availability of dispersing individuals and their ability to disperse within the broader landscape (Fahrig and Merriam 1994, p. 52). When the number of individuals at the landscape or regional level that are available to disperse declines, the overall population begins to decline and will, in turn, affect the number of individuals available to disperse. Connectivity between habitat patches is one means of facilitating dispersal, but the appropriate size or configuration of the dispersal corridors needed to facilitate connectivity for many species is unknown.

Causes of Habitat Fragmentation Within Lesser Prairie-Chicken Range

A number of factors can cause or contribute to habitat fragmentation. Generally, fragmentation can result from the direct loss or alteration of habitat due to conversion to other land uses or

from habitat alteration which indirectly leaves the habitat in such a condition that the remaining habitat no longer functionally provides the preferred life-history requisite. Functional habitat impacts can include disturbances that alter the existing successional state of a given area, create a physical barrier that precludes use of otherwise suitable areas, or triggers a behavioral response by the organism such that otherwise suitable habitats are abandoned or no longer used. Fragmentation tends to be most significant when human developments are dispersed across the landscape rather than being concentrated in fewer areas. Anthropogenic causes of fragmentation tend to be more significant than natural causes because the organism has likely evolved in concert with the natural causes.

Initially, settlement and associated land use changes had the greatest influence on fragmentation in the Great Plains. Knopf (1994, p. 249) identified four universal changes that occurred in Great Plains grasslands postsettlement, based on an evaluation of observations made by early explorers. These changes were identified as a change in the native grazing community, cultivation, wetland conversion, and encroachment of woody vegetation.

EuroAmerican settlement of much of the Great Plains began in earnest with passage of the Homestead Act of 1862. Continued settlement and agricultural development of the Great Plains during the late 1800s and early 1900s clearly contributed to conversion and fragmentation of once open native prairies into a mosaic of varied land uses such as cultivated cropland, expanding cedar woodlands, and remnants of grassland (NRCS 1999, p. 1; Coppedge *et al.* 2001, p. 47; Brennan and Kuvlesky 2005, pp. 2–3). Changes in agricultural practices and advancement of modern machinery combined with an increasing demand for agricultural products continued to spur conversion of native prairies well into the mid-1900s (NRCS 1999, p. 2). Increasing human population densities in rural areas of the Great Plains led to construction of housing developments as growing cities began to expand into the surrounding suburban landscapes. Development and intensification of unsuitable land uses in these urbanizing landscapes also contributed to conversion and fragmentation of grasslands, further reducing richness and abundance of avian populations (Perlut *et al.* 2008, p. 3149; Hansen *et al.* 2011, p. 826). See the section on settlement below for related discussion.

Oil and gas development also began during the mid to late 1800s. Eventually, invention of the automobile in the early twentieth century and its rise to prominence as the primary mode of personal transportation stimulated increased exploration and development of oil and gas (Hymel and Wolfsong 2006, p. 4). Habitat loss and fragmentation associated with access roads, drill pads, pipelines, waste pits, and other components typically connected with exploration and extraction of oil and gas are considered to be among the most significant ecological impacts from oil and gas development and the impacts often extend beyond the actual physical structures (Weller *et al.* 2002, p. 2). See the section on energy development below for related discussion.

As human populations continued to expand outside of existing suburban areas, particularly into rural regions, an increasing array of human features such as powerlines, highways, secondary roads, communication towers, and other types of infrastructure necessary to support these human populations appeared on the landscape (Leu *et al.* 2008, p. 1119). Often these developments can degrade ecosystem functions and lead to fragmentation even when the overall development footprint is relatively small.

Recent research demonstrates that natural vertical features like trees and artificial, above ground vertical structures such as power poles, fence posts, oil and gas wells, towers, and similar developments can cause general habitat avoidance and displacement in lesser prairie-chickens and other prairie grouse (Anderson 1969, entire; Robel 2002, entire; Robel *et al.* 2004, entire; Hagen *et al.* 2004, entire; Pitman *et al.* 2005, entire; Pruett *et al.* 2009a, entire; Hagen *et al.* 2011 entire). This avoidance behavior is presumably a behavioral response that serves to limit exposure to predation. The observed avoidance distances can be much larger than the actual footprint of the structure and appear to vary depending upon the type of structure. These structures can have significant negative impacts by contributing to further fragmentation of otherwise suitable habitats.

Prairie grouse, like the lesser prairie-chicken, did not evolve with tall, vertical structures present on the landscape and, in general, have low tolerance for tall structures. As discussed in ''Altered Fire Regimes and Encroachment by Invasive Woody Plants'' below, encroachment of trees into native grasslands preferred by lesser prairie-chickens ultimately renders otherwise suitable habitat unsuitable unless steps are taken to remove these trees. Even artificially erected trees can cause an avoidance response. Anderson (1969, pp. 640–641) observed that greater prairie-chickens abandoned lek territories when a 4-m (13-ft) tall coniferous wind break was artificially erected 52 m (170 ft) from an active lek.

Increasingly, artificial vertical structures are appearing in landscapes used by lesser prairie-chickens. The placement of these vertical structures in open grasslands represents a significant change in the species' environment and is a relatively new phenomenon over the evolutionary history of this species. The effects of these structures on the life history of prairie grouse are only beginning to be evaluated, with similar avoidance behaviors also having been observed in sage grouse (75 FR 13910, March 23, 2010).

Robel (2002, p. 23) reported that a single commercial-scale wind turbine creates a habitat avoidance zone for the greater prairie-chicken that extends as far as 1.6 km (1 mi) from the structure. Lesser prairie-chickens likely exhibit a similar response to tall structures like wind turbines (Pitman *et al.* 2005, pp. 1267–1268). The Lesser Prairie-Chicken Interstate Working Group identified the need for a contiguous block of 52 sq km (20 sq mi) of high-quality rangeland habitat to successfully maintain a local population of lesser prairie-chicken; based on this need and the fact that the majority of remaining populations are fragmented and isolated into islands of unfragmented, open prairie habitat, the Service recommended that an 8-km (5-mi) voluntary no-construction buffer be established around prairie grouse leks to account for behavioral avoidance and to protect lesser prairie-chicken populations and habitat corridors needed for future recovery (Manville 2004, pp. 3–4). No lesser prairie-chickens were observed nesting or lekking within 0.8 km (0.5 mi) of a gas line compressor station, and otherwise suitable habitat was avoided within a 1.6-km (1-mi) radius of a coal-fired power plant (Pitman *et al.* 2005, pp. 1267–1268). Pitman *et al.* (2005, pp. 1267–1268) also observed that female lesser prairie-chickens selected nest sites that were significantly further from powerlines, roads, buildings, and oil and gas wellheads than would be expected at random. Specifically, they observed that lesser prairie-chickens seldom nested or reared broods within approximately 177 m (580 ft) of oil or gas wellheads, 400 m (1,312 ft) of electrical transmission lines, 792 m (2,600 ft) of improved roads, and 1,219 m (4,000 ft) of buildings; and, the

observed avoidance was likely influenced, at least in part, by disturbances such as noise and visual obstruction associated with these features. Similarly, Hagen *et al* (2004, p. 75) indicated that areas used by lesser prairie-chickens were significantly further from these same types of features than areas that were not used by lesser prairie-chickens. They concluded that the observed avoidance was likely due to potential for increased predation by raptors or due to presence of visual obstructions on the landscape (Hagen *et al.* 2004, pp. 74–75).

Robel *et al.* (2004, pp. 256–262) determined that habitat displacement associated with avoidance of certain structures by lesser prairie-chickens can be substantial, collectively exceeding 21,000 ha (53,000 ac) in a three-county area of southwestern Kansas. Using information on existing oil and gas wells, major powerlines (115 kV and larger), and existing wind turbines and proposed wind energy development in northwestern Oklahoma, Dusang (2011, p. 61) modeled the effect of these anthropogenic structures on lesser prairie-chicken habitat in Oklahoma. He estimated that existing and proposed development of these structures potentially would eliminate some 960,917 ha (2,374,468 ac) of nesting habitat for lesser prairie-chickens, based on what is currently known about their avoidance of these structures.

Avoidance of vertical features such as trees and transmission lines likely is due to frequent use of these structures as hunting perches by birds of prey (Hagen *et al.* 2011, p. 72). Raptors actively seek out and use power poles and similar aboveground structures in expansive grassland areas where natural perches are limited. In typical lesser prairie-chicken habitat where vegetation is low and the terrain is relatively flat, power lines and power poles provide attractive hunting, loafing, and roosting perches for many species of raptors (Steenhof *et al.* 1993, p. 27). The elevated advantage of transmission lines and power poles serve to increase a raptor's range of vision, allow for greater speed during attacks on prey, and serve as territorial markers. While the effect of avian predation on lesser prairie-chickens undoubtedly depends on raptor densities, as the number of perches or nesting features increase, the impact of avian predation will increase (see separate discussion under ''*Predation*'' below). The perception that these vertical structures are associated with predation may cause lesser prairie-chickens to avoid areas near these structures even when raptor densities are low. Sensitivity to electromagnetic fields generated by the transmission lines may be another reason lesser prairie-chickens might be avoiding these areas (Fernie and Reynolds 2005, p. 135) (see separate discussion under ''*Wind Power and Energy Transmission Operation and Development*'' below).

Where grassland patches remained, overgrazing, drought, lack of fire, woody plant and exotic grass invasions, and construction of various forms of infrastructure impacted the integrity of the remaining fragments (Brennan and Kuvlesky 2005, pp. 4–5). Domestic livestock management following settlement tended to promote more uniform grazing patterns, facilitated by construction of fences, which led to reduced heterogeneity in remaining grassland fragments (Fuhlendorf and Engle 2001, p. 626; Pillsbury *et al.* 2011, p. 2). See related discussions in the relevant sections below.

This ever-escalating fragmentation and homogenization of grasslands contributed to reductions in the overall diversity and abundance of grassland-endemic birds and caused populations of many species of grassland-obligate birds, such as the lesser prairie-chicken to decline (Coppedge *et al.* 2001, p. 48; Fuhlendorf and Engle, 2001, p. 626). Fragmentation and homogenization of grasslands is particularly detrimental for lesser prairie-chickens who typically prefer areas where individual habitat needs are in close proximity to each other. For example, in suitable habitats, desired vegetation for nesting and brood rearing typically occurs within relatively short distances of the breeding area.

Human-caused habitat fragmentation with its associated habitat loss and degradation is considered by some to be the leading threat to biodiversity (Hunter and Gibbs 2007, p. 182), and grasslands as a whole are one of the most endangered ecosystems worldwide with agricultural development continuing to be a primary factor (With *et al.* 2008, p. 3152). Human disturbances are rapidly increasing the prevalence of edges in most terrestrial landscapes, and the process is not abating (Samson 1980a, p. 250; Sisk and Battin 2002, p. 41). The continued loss and conversion of grassland nesting and breeding habitat remains the largest threat to the future of many species of grassland birds (NRCS 1999, p. 3). As a group, grassland nesting birds have experienced greater declines in population size than any other group of birds, and some of the most significant causes include habitat loss and fragmentation, changes in land use, and habitat degradation (Knopf 1994, p. 251; Horn and Koford 2006, p. 109).

Effects of Habitat Fragmentation

While much of the conversion of native grasslands to agriculture in the Great Plains was largely completed by the 1940s and has slowed in more recent decades, grassland bird populations continue to decline (With *et al.* 2008, p. 3153). Bird populations may initially appear resistant to landscape change only to decline inexorably over time because remaining grassland fragments may not be sufficient to prevent longer term decline in their populations (With *et al.* 2008, p. 3165). The decrease in patch size and increase in edges associated with fragmentation are known to have caused reduced abundance, reduced nest success, and reduced nest density in many species of grassland birds (Pillsbury *et al.* 2011, p. 2).

Habitat fragmentation has been shown to negatively impact population persistence and influence the species extinction process through several mechanisms (Wilcove *et al.* 1986, p. 246). Once fragmented, the remaining habitat fragments may be inadequate to support crucial life-history requirements (Samson 1980b, p. 297). The land-use matrix surrounding remaining suitable habitat fragments may support high densities of predators or brood parasites (organisms that rely on the nesting organism to raise their young), and the probability of recolonization of unoccupied fragments decreases as distance from the nearest suitable habitat patch increases (Wilcove *et al.* 1986, p. 248; Sisk and Battin 2002, p. 35). Invasion by undesirable plants and animals is often facilitated around the perimeter or edge of the patch, particularly where roads are present (Weller *et al.* 2002, p. 2). Additionally, as animal populations become smaller and more isolated, they are more susceptible to random (stochastic) events and reduced genetic diversity via drift and inbreeding (Keller and Waller 2002, p. 230). Population viability depends on the size and spacing of remaining fragments (Harrison and Bruna 1999, p. 226; With *et al.* 2008, p. 3153). O'Connor *et al.* (1999, p. 56) concluded that grassland birds, as a group, are particularly sensitive to habitat fragmentation, primarily due to sensitivity to fragment size. Consequently, the effects of fragmentation are the most severe on area-sensitive species (Herkert 1994, p. 468).

Area-sensitive species are those species that respond negatively to decreasing habitat patch size (Robbins 1979, p. 198; Finch 1991, p. 1); the term was initially applied to songbirds

inhabiting deciduous forests in eastern North America. However, an increasing number of studies are showing that many grassland birds also are area-sensitive and have different levels of tolerance to fragmentation of their habitat (*e.g.,* see Herkert 1994, entire; Winter and Faaborg 1999, entire). For species that are area-sensitive, once a particular fragment or patch of suitable habitat falls below the optimum size, populations decline or disappear entirely even though suitable habitat may continue to exist within the larger landscape. When the overall amount of suitable habitat within the landscape increases, the patch size an individual area-sensitive bird may utilize generally tends to be smaller (Horn and Koford 2006, p. 115), but they appear to maintain some minimum threshold (Fahrig 1997, p. 608; NRCS 1999, p. 4). Winter and Faaborg (1999, pp. 1429, 1436) reported that the greater prairie-chicken was the most area-sensitive species observed during their study, and this species was not documented from any fragment of native prairie less than 130 ha (320 ac) in size.

Franklin *et al.* (2002, p. 23) described fragmentation in a biological context. According to Franklin, habitat fragmentation occurs when occupancy, reproduction, or survival of the organism has been affected. The effects of fragmentation can be influenced by the extent, pattern, scale, and mechanism of fragmentation (Franklin *et al.* 2002, p. 27). Habitat fragmentation also can have positive, negative, or neutral effects, depending on the species (Franklin *et al.* 2002, p. 27). As a group, grouse are considered to be particularly intolerant of extensive habitat fragmentation due to their short dispersal distances, specialized food habits, generalized antipredator strategies, and other life-history characteristics (Braun *et al.* 1994, p. 432). Lesser prairie-chickens in particular have a low adaptability to habitat alteration, particularly activities that fragment suitable habitat into smaller, less valuable pieces. Lesser prairie-chickens utilize habitat patches with different vegetative structure dependent upon a particular phase in their life cycle, and the loss of even one of these structural components can significantly reduce the overall value of that habitat to lesser prairie-chickens. Fragmentation not only reduces the size of a given patch but also can reduce the interspersion or variation within a larger habitat patch, possibly eliminating important structural features crucial to lesser prairie-chickens.

Lesser prairie-chickens and other species of prairie grouse require large expanses (*i.e.,* 1,024 to 10,000 ha (2,530 to 24,710 ac)) of interconnected, ecologically diverse native rangelands to complete their life cycles (Woodward *et al.* 2001, p. 261; Flock 2002, p. 130; Fuhlendorf *et al.* 2002, p. 618; Davis 2005, p. 3), more so than almost any other grassland bird (Johnsgard 2002, p. 124). Davis (2005, p. 3) states that the combined home range of all lesser prairie-chickens at a single lek is about 49 sq km (19 sq mi or 12,100 ac). According to Applegate and Riley (1998, p. 14), a viable lek will have at least six males accompanied by an almost equal number of females. Because leks need to be clustered so that interchange among different leks can occur in order to reduce interbreeding problems on any individual lek, they considered a healthy population to consist of a complex of six to ten viable leks (Applegate and Riley 1998, p. 14). Consequently, most grouse experts consider the lesser prairie-chicken to be an area-sensitive species, and large areas of intact, unfragmented landscapes of suitable mixed-grass, short-grass, and shrubland habitats are considered essential to sustain functional, self-sustaining populations (Giesen 1998, pp. 3–4; Bidwell *et al.* 2002, pp. 1–3; Hagen *et al.* 2004, pp. 71, 76–77). Therefore, areas of otherwise suitable habitat can readily become functionally unusable due to the effects of fragmentation.

The lesser prairie-chicken has several life-history traits common to most species of grouse that influence its vulnerability to the impacts of fragmentation, including short lifespan, low nest success, strong site fidelity, low mobility, and a relatively small home range. This vulnerability is heightened by the considerable extent of habitat loss that has already occurred over the range of the species. The resiliency and redundancy of these populations have been reduced as the number of populations that formerly occupied the known historical range were lost or became more isolated by fragmentation of that range. Isolation of remaining populations will continue to the extent these populations remain or grow more separated by areas of unsuitable habitat, particularly considering their limited dispersal capabilities (Robb and Schroeder 2005, p. 36).

Fragmentation is becoming a particularly significant ecological driver in lesser prairie-chicken habitats, and several factors are known to be contributing to the observed destruction, modification, or curtailment of the lesser prairie-chicken's habitat or range. Extensive grassland and untilled rangeland habitats historically used by lesser prairie-chickens have become increasingly scarce, and remaining areas of these habitat types continue to be degraded or fragmented by changing land uses. The loss and fragmentation of the mixed-grass, short-grass, and shrubland habitats preferred by lesser prairie-chickens has contributed to a significant reduction in the extent of currently occupied range. Based on the cooperative mapping efforts led by the Playa Lakes Joint Venture and Lesser Prairie-Chicken Interstate Working Group, lesser prairie-chickens are estimated to now occupy only about 16 percent of their estimated historically occupied range. What habitat remains is now highly fragmented (Hagen *et al.* 2011, p. 64).

Several pervasive factors, such as conversion of native grasslands to cultivated agriculture; change in the historical grazing and fire regime; tree invasion and brush encroachment; oil, gas, and wind energy development; road and highway expansion; and others, have been implicated in not only permanently altering the Great Plains landscape but in specifically causing much of the observed loss, alteration, and fragmentation of lesser prairie-chicken habitat (Hagen and Giesen 2005, np.; Elmore *et al.* 2009, pp. 2, 10–11; Hagen *et al.* 2011, p. 64). Additionally, lesser prairie-chickens actively avoid areas of human activity and noise or areas that contain certain vertical features (Robel *et al.* 2004, pp. 260–262; Pitman *et al.* 2005, pp. 1267–1268; Hagen *et al.* 2011, p. 70–71). Avoidance of vertical features such as trees and transmission lines likely is due to frequent use of these structures as hunting perches by birds of prey (Hagen *et al.* 2011, p. 72). Pitman *et al.* (2005, pp. 1267–1268) observed that lesser prairie-chickens seldom nested or reared broods within approximately 177 m (580 ft) of oil or gas wellheads, 366 m (1,200 ft) of electrical transmission lines, 792 m (2,600 ft) of improved roads, and 1,219 m (4,000 ft) of buildings. The observed avoidance was likely influenced, at least in part, by disturbances such as noise and visual obstruction associated with these features. No lesser prairie-chicken nesting or lekking was observed within 0.8 km (0.5 mi) of a gas line compressor station, and otherwise suitable habitat was avoided within a 1.6-km (1-mi) radius of a coal-fired power plant (Pitman *et al.* 2005, pp. 1267–1268).

Oil and gas development activities, particularly drilling and road and highway construction, also contribute to surface fragmentation of lesser prairie-

chicken habitat for many of the same reasons observed with other artificial structures (Hunt and Best 2004, p. 92). The incidence of oil and gas exploration has been rapidly expanding within the range of the lesser prairie-chicken. A more thorough discussion of oil and gas activities within the range of the lesser prairie-chicken is discussed below.

Many of the remaining habitat fragments and adjoining land use types subsequently fail to meet important habitat requirements for lesser prairie-chickens. Other human-induced developments, such as buildings, fences, and many types of vertical structures, which may have an overall smaller physical development footprint per unit area, serve to functionally fragment otherwise seemingly suitable habitat; this causes lesser prairie-chickens to cease or considerably reduce their use of habitat patches impacted by these developments (Hagen *et al.* 2011 pp. 70–71). As the intervening matrix between the remaining fragments of suitable habitat becomes less suitable, dispersal patterns can be disrupted, effectively isolating remaining islands of habitat. These isolated fragments then become less resilient to the effects of change in the overall landscape and likely will be more prone to localized extinctions. The collective influence of habitat loss, fragmentation, and disturbance effectively reduces the size and suitability of the remaining habitat patches. Pitman *et al.* (2005, p. 1267) calculated that nesting avoidance at the distances they observed would effectively eliminate some 53 percent (7,114 ha; 17,579 ac) of otherwise suitable nesting habitat within their study area in southwestern Kansas. Once the remaining habitat patches fall below the minimum size required by lesser prairie-chickens, these patches become uninhabitable even though they may otherwise provide optimum habitat characteristics. Although a minimum size has not been established, studies and expert opinion, including those regarding greater prairie-chickens, suggest that the minimum parcel size is likely to exceed 100 ha (250 acres) (Samson 1980b, p. 295; Winter and Faaborg 1999, pp. 1429, 1436; Davis 2005, p. 3).

Fragmentation poses a threat to the persistence of local lesser prairie-chicken populations through many of the same mechanisms identified for other species of grassland birds. Factors such as habitat dispersion and the extent of habitat change, including patch size, edge density, and total rate of landscape change influence juxtaposition and size of remaining patches of rangeland such that they may no longer be large enough to support populations (Samson 1980b, p. 297; Woodward *et al.* 2001, pp. 269–272; Fuhlendorf *et al.* 2002, pp. 623–626). Additionally, necessary habitat heterogeneity may be lost, and habitat patches may accommodate high densities of predators. Ultimately lesser prairie-chicken interchange among suitable patches of habitat may decrease, possibly affecting population and genetic viability (Wilcove *et al.* 1986, pp. 251–252; Knopf 1996, p. 144). Predation can have a major impact on lesser prairie-chicken demography, particularly during the nesting and brood-rearing seasons (Hagen *et al.* 2007, p. 524). Patten *et al.* (2005b, p. 247) concluded that habitat fragmentation, at least in Oklahoma, markedly decreases the probability of long-term population persistence in lesser prairie-chickens.

Many of the biological factors affecting the persistence of lesser prairie-chickens are exacerbated by the effects of habitat fragmentation. For example, human population growth and the resultant accumulation of infrastructure such as roads, buildings, communication towers, and powerlines contribute to fragmentation. We expect that construction of vertical infrastructure such as transmission lines will continue to increase into the foreseeable future, particularly given the increasing development of energy resources and urban areas (see ''*Wind Power and Energy Transmission Operation and Development*'' below). Where this infrastructure is placed in occupied lesser prairie-chicken habitats, the lesser prairie-chicken likely will be negatively affected. As the density and distribution of human development continues in the future, direct and functional fragmentation of the landscape will continue. The resultant fragmentation is detrimental to lesser prairie-chickens because they rely on large, expansive areas of contiguous native grassland to complete their life cycle. Given the large areas of contiguous grassland needed by lesser prairie-chickens, we expect that many of these types of developments anticipated in the future will further fragment remaining blocks of suitable habitat and reduce the likelihood of persistence of lesser prairie-chickens over the long term. Long-term persistence is reduced when the suitability of the remaining habitat patches decline, further contributing to the scarcity of suitable contiguous blocks of habitat and resulting in increased human disturbance as parcel size declines. Human populations are increasing throughout the range of the lesser prairie-chicken, and we expect this trend to continue. Given the demographic and economic trends observed over the past several decades, residential development will continue.

The cumulative influence of habitat loss and fragmentation on lesser prairie-chicken distribution is readily apparent at the regional scale. Lesser prairie-chicken populations in eastern New Mexico and the western Texas Panhandle are isolated from the remaining populations in Colorado, Kansas, and Oklahoma. On a smaller, landscape scale, core populations of lesser prairie-chickens within the individual States are isolated from other nearby populations by areas of unsuitable land uses (Robb and Schroeder 2005, p. 16). Then, at the local level within a particular core area of occupied habitat, patches of suitable habitat have been isolated from other suitable habitats by varying degrees of unsuitable land uses. Very few large, intact patches of suitable habitat remain within the historically occupied landscape.

We conducted a spatial analysis of the extent of fragmentation within the estimated occupied range of the lesser prairie-chicken. Infrastructure features such as roads, transmission lines, airports, cities and similar populated areas, oil and gas wells, and other vertical features such as communication towers and wind turbines were delineated. These features were buffered by known avoidance distances and compared with likely lesser prairie-chicken habitat such as that derived from the Southern Great Plains Crucial Habitat Tool and 2008 LandFire vegetation cover types. Based on this analysis, 99.8 percent of the suitable habitat patches were less than 2,023 ha (5,000 ac) in size. Our analysis revealed that only some 71 patches that were equal to, or larger than, 10,117 ha (25,000 ac) exist within the entire five-state estimated occupied range. Of the patches over 10,117 ha (25,000 ac), all were impacted by fragmenting features, just not to the extent that the patch was fragmented into a smaller sized patch.

This analysis is a very conservative estimate of the extent of fragmentation within the estimated occupied range. We only used reasonably available datasets. Some datasets were unavailable, such as the extent of fences, and other infrastructural features were not fully captured because our datasets were incomplete for those features. Unfortunately, a more precise quantification of the impact of habitat loss and alteration on persistence of the

lesser prairie-chicken is complicated by a variety of factors including time lags in response to habitat changes and a lack of detailed historical information on habitat conditions.

In summary, habitat fragmentation is an ongoing threat that is occurring throughout the occupied range of the lesser prairie-chicken. Similarly, much of the historical range is disjunct and separated by large expanses of unsuitable habitat. Once fragmented, most of the factors contributing to habitat fragmentation cannot be reversed. Many types of human developments likely will exist for extended time periods and will have a significant, lasting adverse influence on persistence of lesser prairie-chickens. Therefore, current and future habitat fragmentation is a threat to the lesser prairie-chicken. In the sections that follow, we will examine the various causes of lesser prairie-chicken habitat fragmentation in more detail.

Habitat Conversion for Agriculture

At the time the lesser prairie-chicken was determined to be taxonomically distinct from the greater prairie-chicken in 1885, much of the historical range was already being subjected to alteration as settlement of the Great Plains progressed. EuroAmerican settlement in New Mexico and Texas began prior to the 1700s, and at least one trading post already had been established in Colorado by 1825 (Coulson and Joyce 2003, pp. 34, 41, 44). Kansas had become a territory by 1854 and had already experienced an influx of settlers due to establishment of the Santa Fe Trail in 1821 (Coulson and Joyce 2003, p. 37). Western Oklahoma was the last area to experience extensive settlement with the start of the land run in 1889.

Settlement obviously brought about many changes within the historical range of the lesser prairie-chicken. Between 1915 and 1925, considerable areas of prairie sod had been plowed in the Great Plains and planted to wheat (Laycock 1987, p. 4). By the 1930s, the lesser prairie-chicken had begun to disappear from areas where it had been considered abundant with populations nearing extirpation in Colorado, Kansas, and New Mexico, and markedly reduced in Oklahoma and Texas. Several experts on the lesser prairie-chicken identified conversion of native sand sagebrush and shinnery oak rangeland to cultivated agriculture as an important factor in the decline of lesser prairie-chicken populations (Copelin 1963, p. 8; Jackson and DeArment 1963, p. 733; Crawford and Bolen 1976a, p. 102; Crawford 1980, p. 2; Taylor and Guthery 1980b, p. 2; Braun *et al.* 1994, pp. 429, 432–433; Mote *et al.* 1999, p. 3). By the 1930s, Bent (1932, pp. 283–284) hypothesized that extensive cultivation and overgrazing had already caused the species to disappear from portions of the historical range where lesser prairie-chickens had once been abundant. Additional areas of previously unbroken grassland were brought into cultivation in the 1940s, 1970s, and 1980s (Laycock 1987, pp. 4–5). Bragg and Steuter (1996, p. 61) estimated that by 1993, only 8 percent of the bluestem-grama association and 58 percent of the mesquite-buffalo grass association, as described by Kuchler (1964, entire), remained.

As the amount of native grasslands and untilled native rangeland declined in response to increasing settlement, the amount of suitable habitat capable of supporting lesser prairie-chicken populations declined accordingly. Correspondingly, as the amount of available suitable habitat diminished, carrying capacity was reduced and the number of lesser prairie-chickens declined. However, documenting the degree to which these settlement-induced impacts occurred is complicated by a lack of solid historical information on population size and extent of suitable habitat. Additionally, because cultivated grain crops may have provided increased or more dependable winter food supplies (Braun *et al.* 1994, p. 429), the initial conversion of smaller patches of native prairie to cultivation may have been temporarily beneficial to the species. Sharpe (1968, pp. 46–50) believed that the presence of cultivated grains may have facilitated the temporary occurrence of lesser prairie-chickens in Nebraska. However, landscapes having greater than 20 to 37 percent cultivated grains may not support stable lesser prairie-chicken populations (Crawford and Bolen 1976a, p. 102). While lesser prairie-chickens may forage in agricultural croplands, they avoid landscapes dominated by cultivated agriculture, particularly where small grains are not the dominant crop (Crawford and Bolen 1976a, p. 102). Areas of cropland do not provide adequate year-round food or cover for lesser prairie-chickens. Much of the historical lesser prairie-chicken habitat has already been converted to agricultural cropland.

In the Service's June 7, 1998, 12-month finding for the lesser prairie-chicken (63 FR 31400), we attempted to assess the loss of native rangeland using data available through the National Resources Inventory of the USDA NRCS. However, very limited information on lesser prairie-chicken status was available to us prior to 1982. When we examined the 1992 National Resources Inventory Summary Report, we were able to estimate the change in rangeland acreage between 1982 and 1992 by each State within the range of the lesser prairie-chicken. As expected, when the trends were examined statewide, each of the five States within the range of the lesser prairie-chicken showed a decline in the amount of rangeland acreage over that time period, indicating that conversion of lesser prairie-chicken habitat likely continued to occur since the 1980s. In assessing the change specifically within areas occupied by lesser prairie-chickens, we then narrowed our analysis to just those counties where lesser prairie-chickens were known to occur. That analysis, which was based on the information available at that time, used a much smaller extent of estimated occupied range than likely occurred at that time. The analysis of the estimate change in rangeland acreage between 1982 and 1992, for counties specifically within lesser prairie-chicken range, did not demonstrate a statistically significant change, possibly due to small sample size and large variation about the mean. In this analysis, the data for the entire county was used without restricting to just those areas estimated to be within the historical and currently occupied ranges. A more recent, area-sensitive analysis was needed.

Although a more recent analysis of the Natural Resources Inventory information was desired, we were unable to obtain specific county-by-county information because the NRCS no longer releases county-level information. Release of Natural Resources Inventory results is guided by NRCS policy and is in accordance with Office of Management and Budget and USDA Quality of Information Guidelines developed in 2001. NRCS releases Natural Resources Inventory estimates only when they meet statistical standards and are scientifically credible in accordance with these policies. In general, the Natural Resources Inventory survey system was not developed to provide acceptable estimates for areas as small as counties but rather for analyses conducted at the national, regional, and state levels, and for certain sub-state regions (Harper 2012).

We then attempted to use the 1992 National Land Cover Data (NLCD) information to estimate the extent and change in certain land cover types. The NLCD was the first land-cover mapping project that was national in scope and is based on images from the Landsat thematic mapper. No other national land-cover mapping program had

previously been undertaken, despite the availability of Landsat thematic mapper information since 1984. The 1992 NLCD provides information on 21 different land cover classes at a 30-meter resolution. Based on the 1992 NLCD, and confining our analysis to just the known historical and currently occupied range, we estimated that there were 137,073.6 sq km (52,924.4 sq mi) of cultivated cropland in the entire historical range and 16,436.9 sq km (6,346.3 sq mi) in the currently occupied range. This includes areas planted to row crops, such as corn and cotton, small grains like wheat and *Hordeum vulgar*e (barley), and fallow cultivated areas that had visible vegetation at the time of the imagery.

Estimating the extent of untilled rangeland is slightly more complicated. The extent of grassland areas dominated by native grasses and forbs could be determined in a manner similar to that for cultivated cropland. We estimated from the 1992 NLCD that there were 207,846 sq km (80,250 sq mi) of grassland within the entire historical range, with only some 49,000 sq km (18,919 sq mi) of grassland in the currently occupied range. However, the extent of shrubland also must be included in the analysis because areas classified as shrubland (*i.e.,* areas having a canopy cover of greater than 25 percent) are used by lesser prairie-chicken, such as shinnery oak grasslands, and also may be grazed by livestock. We estimated that there were 92,799 sq km (35,830 sq mi) of shrubland within the entire historical range with some 4,439 sq km (1,714 sq mi) of shrubland in the currently occupied range, based on the 1992 NLCD.

These values can then be compared with those available through the 2006 NLCD information to provide a rough approximation of the change in land use since 1992. In contrast to the 1992 NLCD, the 2006 NLCD provides information on only 16 different land cover classes at a 30-meter resolution. Based on this dataset, and confining our analysis to just the known historical and currently occupied range, we estimated that there were 126,579 sq km (48,872 sq mi) of cultivated cropland in the entire historical range and 19,588 sq km (7,563 sq mi) in the currently occupied range. This cover type consists of any areas used annually to produce a crop and includes any land that is being actively tilled. Estimating the extent of untilled rangeland is conducted similarly to that for 1992. Using the 2006 NLCD, we estimated that there were 163,011 sq km (62,939 sq mi) of grassland within the entire historical range with some 42,728 sq km (16,497 sq mi) of grassland in the currently occupied range. In 2006, the shrubland cover type was replaced by a shrub-scrub cover type. This new cover type was defined as the areas dominated by shrubs less than 5 m (16 ft) tall with a canopy cover of greater than 20 percent. We estimated that there were 146,818 sq km (56,686 sq mi) of shrub/scrub within the entire historical range, with some 10,291 sq km (3,973 sq mi) of shrub/scrub in the currently occupied range.

Despite the difference in the classification of land cover between 1992 and 2006, we were able to make rough comparisons between the two datasets. A comparison reveals that apparently the extent of cropland within the entire historical range declined between 1992 and 2006. In contrast, within the occupied range, the extent of cropland areas increased during that same period. A comparison of the grassland and untilled rangeland indicates that the amount of grassland declined in both the historical range and the occupied range between 1992 and 2006. However, the amount of shrub-dominated lands increased in both the historical and currently occupied range. Overall, the estimated amount of grassland and shrub-dominated land, as an indicator of untilled rangelands, increased somewhat over the historical range during that period but declined slightly within the occupied range during the same period. Based on the definition of shrub/scrub cover type in 2006, the observed increases in shrub-dominated cover only could have been due to increased abundance of eastern red cedar, an invasive woody species that tends to decrease suitability of grasslands and untilled rangelands for lesser prairie-chickens (Woodward *et al.* 2001, pp. 270–271; Fuhlendorf *et al.* 2002, p. 625).

However, direct comparison between the 1992 and 2006 NLCD is problematic due to several factors. First, the 1992 NLCD was based on an unsupervised classification algorithm (an iterative process used to classify or ''cluster'' data obtained using remote sensing), whereas NLCD 2001 and later versions were based on a supervised classification and regression tree algorithm (data classification in which the data analyst uses available information to assist in the classification). Second, terrain corrections for the 1992 NLCD were based on digital elevation models with a 90-meter spatial resolution, whereas terrain correction for NLCD 2001 and later used 30-meter digital elevation models. Third, the impervious surface mapping that is part of NLCD 2001 and later versions resulted in the identification of many more roads than could be identified in the 1992 NLCD. However, most of these roads were present in 1992. Fourth, the imagery for the 2001 NLCD and later versions was corrected for atmospheric effects prior to classification, whereas NLCD 1992 imagery was not. Lastly, there are subtle differences between the NLCD 1992 and NLCD 2001 land-cover legends. Additionally, we did not have an estimated occupied range for 1992. Instead we used the occupied range as is currently estimated. The comparison in the amount of cropland, grassland, and shrubland could be influenced by a change in the amount of occupied range in 1992. Due to the influence of CRP grasslands (discussed below) on the distribution of lesser prairie-chickens in Kansas, the occupied range was much smaller in 1992. One would anticipate that the influence of CRP establishment north of the Arkansas River in Kansas might have led to considerably more areas of grassland in 2006 as compared to 1992. However, the amount of grassland was observed to have declined within the occupied range of the lesser prairie-chicken between 1992 and 2006, possibly indicating that the extent of grasslands continued to decline despite the increase in CRP grasslands.

If we restrict our analysis to Kansas alone, the extent of grasslands in 1992 was about 39,381 sq km (15,205 sq mi) within the historical range and 22,923 sq km (8850 sq mi) in the occupied range. In 2006, the extent of grasslands in Kansas was some 27,351 sq km (10,560 sq mi) within the historical range and 18,222 sq km (7,035 sq mi) in the occupied range. While not definitive, the analysis indicates that the extent of grasslands continued to decline even in Kansas where lesser prairie-chicken populations are declining but more robust than in other States.

In summary, conversion of the native grassland habitats used by lesser prairie-chickens for agricultural uses has resulted in the permanent, and in some limited instances, temporary loss or alteration of habitats used for feeding, sheltering, and reproduction. Consequently, populations of lesser prairie-chickens likely have been extirpated or significantly reduced, underscoring the degree of impact that historical conversion of native grasslands has posed to the species. We expect a very large proportion of the land area that is currently in agricultural production will likely remain so over the foreseeable future because we have no information to suggest that agricultural practices are likely to

change. While persistent drought and declining supplies of water for irrigation may lead to conversion of some croplands to a noncropland state, we anticipate that the majority of cropland will continue to be used to produce a crop. Because considerable areas of suitable arable lands have already been converted to agricultural production, we do not expect significant additional, future habitat conversion to agriculture within the range of the lesser prairie-chicken. However, as implementation of certain agricultural conservation programs like the CRP change programmatically, some continued conversion of grassland back into cultivation is still expected to occur. Conservation Reserve Program contracts, as authorized and outlined by regulation, are of limited, temporary duration, and the program is subject to funding by Congress. We also recognize that the historical large-scale conversion of grasslands to agricultural production has resulted in fragmented grassland and shrubland habitats used by lesser prairie-chickens such that currently occupied lands are not adequate to provide for the conservation of the species into the foreseeable future, particularly when cumulatively considering the threats to the lesser prairie-chicken.

Conservation Reserve Program (CRP)

The loss of lesser prairie-chicken habitat due to conversion of native grasslands to cultivated agriculture has been mitigated somewhat by the CRP. Authorization and subsequent implementation of the CRP began under the 1985 Food Security Act and, since that time, has facilitated restoration of millions of acres of marginal and highly erosive cropland to grassland, shrubland, and forest habitats (Riffell and Burger 2006, p. 6). The CRP is administered by the USDA's Farm Service Agency and was established primarily to control soil erosion on cropland by converting cropped areas to a vegetative cover such as perennial grassland. Under the general signup process, lands are enrolled in CRP using a competitive selection process. However, certain environmentally desirable lands can be enrolled at any time under a continuous signup process. Additional programs, such as the Conservation Reserve Enhancement Program and designation as a Conservation Priority Area can be used to target enrollment of CRP. Participating producers receive an annual rental payment for the duration of a multiyear CRP contract. Cost sharing is provided to assist in the establishment of the vegetative cover practices. Once the CRP contract expires, typically after 10 to 15 years, landowners have the option to reenroll in the program, convert lands back to cropland, or leave lands in a noncropland state.

In 2009, the enrollment authority or acreage cap for CRP was reduced from 15.9 million ha (39.2 million ac) nationwide to 12.9 million ha (32.0 million ac) through fiscal year 2012, with 1.8 million ha (4.5 million ac) allocated to targeted (continuous) signup programs. Future enrollment authority is unknown and dependent on passage of a new Farm Bill and subsequent funding by Congress. Within a given county, no more than 25 percent of that county's cropland acreage may be enrolled in CRP and the Wetland Reserve Program. A waiver of this acreage cap may be granted under certain circumstances. These caps influence the maximum amounts of cropland that may exist in CRP at any one time. Since 2004, midcontract management has been required on contracts executed after fiscal year 2004 and is voluntary for contracts accepted before that time. Typically these management activities, such as prescribed burning, tree thinning, disking, or herbicide application to control invasive species, are generally prohibited during the primary avian nesting and brood rearing season. Under the CRP, several forms of limited harvest, haying, and grazing are authorized, including emergency haying and grazing. Emergency haying and grazing may be granted on CRP lands to provide relief to ranchers in areas affected by drought or other natural disaster to minimize loss or culling of livestock herds. Haying and grazing under both managed and emergency conditions have the potential to significantly negatively impact vegetation if the amount of forage removed is excessive and prolonged, or if livestock numbers are sufficient to contribute to soil compaction. Additionally, the installation of wind turbines, windmills, wind monitoring devices, or other wind-powered generation equipment may be installed on CRP acreage on a case-by-case basis. Up to 2 ha (5 ac) of wind turbines per contract may be approved.

Lands enrolled in CRP encompasses a significant portion of currently occupied range in several lesser prairie-chicken States, but particularly in Kansas where an increase in the lesser prairie-chicken population is directly related to the amount of land that was enrolled in the CRP and planted to native grasses. Enrollment information is publically available from the Farm Services Agency at the county level. However, specific locations of individual CRP acreages are not publically available due to needs to protect privacy of the individual landowner. The Playa Lakes Joint Venture has an agreement with the Farm Services Agency that allows them to use available data on individual CRP allotments for conservation purposes, provided the privacy of the landowner is protected. The Playa Lakes Joint Venture, using this information, has been able to determine the extent of CRP lands within the estimated occupied range of the lesser prairie-chicken over all five lesser prairie-chicken States (McLachlan *et al.* 2011, p. 24). In conducting this analysis, they restricted their analysis to only those lands that were planted to a grass type of conservation cover and they evaluated all lands within the estimated occupied range, including a 16 km (10 mi) buffer surrounding the occupied areas. Based on this analysis, Kansas was determined to have the most land enrolled in CRP with a grass cover type. Kansas has some 600,000 ha (1,483,027 ac) followed by Texas with some 496,000 ha (1,227,695 ac) of grassland CRP. Enrolled acreages in Colorado, New Mexico, and Oklahoma are 193,064 ha (477,071 ac), 153,000 ha (379,356 ac), and 166,000 ha (410,279 ac), respectively. The amount of grass type CRP within the estimated occupied range totals just over 1.6 million ha (3.9 million ac). While the extent of CRP may have changed slightly due to recent enrollments and re-enrollments and any contract expirations that may have occurred since the study was conducted, the figures serve to highlight the importance of CRP for lesser prairie-chickens. Based on the estimated amount of occupied habitat remaining in these States, CRP fields having a grass type of conservation cover in Kansas comprise some 20.6 percent of the occupied lesser prairie-chicken range, 45.8 percent of the occupied range in Colorado, and 40.9 percent of the occupied range in Texas. New Mexico and Oklahoma have smaller percentages of CRP within the occupied range, 17.9 and 15.1 percent, respectively. When the sizes of the CRP fields were examined, Kansas had some 53 percent, on average, of the enrolled lands that constituted large habitat blocks, as defined. A large block was defined as areas that were at least 5,000 acres in size with minimal amounts of woodland, roads, and developed areas (McLachlan *et al.* 2011, p. 14). All of the other States had 15 percent or less of the enrolled CRP in a large block configuration.

The importance of CRP habitat to the status and survival of lesser prairie-chicken was recently emphasized by Rodgers and Hoffman (2005, pp. 122–123). They determined that the presence of CRP lands planted with native species of grasses facilitated the expansion of lesser prairie-chicken range in Colorado, Kansas, and New Mexico. The range expansion in Kansas resulted in strong population increases there (Rodgers and Hoffman 2005, pp. 122–123). However, in Oklahoma, Texas, and some portions of New Mexico, many CRP fields were planted with a monoculture of introduced grasses. Where introduced grasses were planted, lesser prairie-chickens did not demonstrate a range expansion or an increase in population size (Rodgers and Hoffman 2005, p. 123). An analysis of lesser prairie-chicken habitat quality within a subsample of 1,019 CRP contracts across all five lesser prairie-chicken States was recently conducted by the Rocky Mountain Bird Observatory (Ripper and VerCauteren 2007, entire). They found that, particularly in Oklahoma and Texas, contracts executed during earlier signup periods allowed planting of monocultures of exotic grasses, such as *Bothriochloa* sp. (old-world bluestem) and *Eragrostis curvula* (weeping lovegrass), which provide poor-quality habitat for lesser prairie-chicken (Ripper and VerCauteren 2007, p. 11). Correspondingly, a high-priority conservation recommendation from this study intended to benefit lesser prairie-chickens was to convert existing CRP fields planted in exotic grasses into fields supporting taller, native grass species and to enhance the diversity of native forbs and shrubs used under these contracts. Generally, pure stands of grass lack the habitat heterogeneity and structure preferred by lesser prairie-chickens. Subsequent program adjustments have encouraged the planting of native grass species on CRP enrollments.

Predicting the fate of the CRP and its influence on the lesser prairie-chicken into the future is difficult. The expiration of a contract does not automatically trigger a change in land use. The future of CRP lands is dependent upon three sets of interacting factors: The long-term economies of livestock and crop production, the characteristics and attitudes of CRP owners and operators, and the direct and indirect incentives of existing and future agricultural policy (Heimlich and Kula 1990, p. 7). As human populations continue to grow, the worldwide demands for livestock and crop production are likely to continue to grow. If demand for U.S. wheat and feed grains is high, pressure to convert CRP lands back to cropland will be strong. However, in 1990, all five States encompassing the historical range of the lesser prairie-chicken were among the top 10 States expected to retain lands in grass following contract expiration (Heimlich and Kula 1990, p. 10). A survey of the attitudes of existing CRP contract holders in Kansas, where much of the existing CRP land occurs, revealed that slightly over 36 percent of landowners with an existing contract had made no plans or were uncertain about what they would do once the CRP contract expired (Diebel *et al.* 1993, p. 35). An equal percentage stated that they intended to keep lands in grass for livestock grazing (Diebel *et al.* 1993, p. 35). Some 24 percent of enrolled landowners expected they would return to annual crop production in accordance with existing conservation compliance provisions (Diebel *et al.* 1993, p. 35). The participating landowners stated that market prices for crops and livestock was the most important factor influencing their decision, with availability of cost sharing for fencing and water development for livestock also being an important consideration. However, only a small percentage, about 15 percent, were willing to leave their CRP acreages in permanent cover after contract expiration where incentives were lacking (Diebel *et al.* 1993, p. 8).

Although demand for agricultural commodities and the opinions of the landowners are important, existing and future agricultural policy is expected to have the largest influence on the fate of CRP (Heimlich and Kula 1990, p. 10). The CRP was most recently renewed under the Food, Conservation, and Energy Act of 2008 and is due for reauthorization in 2012. The most recent CRP general signup for individual landowners began March 12, 2012, and expired April 13, 2012. The extent to which existing CRP lands were reenrolled or new lands enrolled into the program is unknown. A new Farm Bill, which will establish the guidelines for CRP over the next five years, is currently under development and the ramifications of this policy on the future of CRP are unknown.

The possibility exists that escalating grain prices due to the recent emphasis on generating domestic energy from biofuels, such as ethanol from corn, grain sorghum, and switchgrass, combined with Federal budget reductions that reduce or eliminate CRP enrollments and renewals, will result in an unprecedented conversion of existing CRP acreage within the Great Plains back to cropland (Babcock and Hart 2008, p. 6). In 2006, the USDA Farm Service Agency provided a small percentage of current CRP contract holders whose contracts were set to expire during 2007 to 2010, with an opportunity (termed REX) to reenroll (10–15 year terms) or extend (2–5 year terms) their contracts. The opportunity to reenroll or extend their contracts was based on the relative environmental benefits of each contract. In March of 2007, the USDA expected that some 9.7 million ha (23.9 million ac) out of the total 11.3 million ha (28 million ac) of eligible CRP contracts would be reenrolled. The remaining 1.7 million ha (4.1 million ac) would be eligible for conversion to crop production or other uses.

Should large-scale loss or reductions in CRP acreages occur, either by reduced enrollments or by conversion back to cultivation upon expiration of existing contracts, the loss of CRP acreage would further diminish the amount of suitable lesser prairie-chicken habitat. This concern is particularly relevant in Kansas where CRP acreages planted to native grass mixtures facilitated an expansion of the occupied lesser prairie-chicken range in that State. In States that planted a predominance of CRP to exotic grasses, loss of CRP in those States would not be as significant as it would in Kansas where CRP largely was planted to native grass and exists in relatively larger habitat blocks. A reduction in CRP acreage could lead to contraction of the currently occupied range and reduced numbers of lesser prairie-chicken rangewide and poses a threat to the status of existing lesser prairie-chicken populations. While the CRP program has had a beneficial effect on the lesser prairie-chicken, particularly in Kansas, the contracts are short term in nature and, given current government efforts to reduce the Federal budget deficit, additional significant new enrollments in CRP are not anticipated. However, we anticipate that some CRP grassland acreages would be reenrolled in the program once contracts expire, subject to the established acreage cap.

A recent analysis of CRP by the National Resources Conservation Service (J. Ungerer and C. Hagen, 2012, Personal Communication) revealed that between 2008 and 2011, some 675,000 acres of CRP contracts expired within the estimated occupied range, the majority located in Kansas. However many of those expired lands remained in grass. Values varied from a low of 72.4 percent remaining in grass in Colorado to a high of 97.5 percent in

New Mexico. Kansas was estimated to have some 90.2 percent of the expired acres during this period still in grass. Values for Oklahoma and Texas had not yet been determined. We expect that many of the acreages that remain in grass in New Mexico are likely composed of exotic species of grasses. Despite a small overall loss in CRP acreage, we are encouraged by the relatively high percentage of CRP that remains in grass. However, we remain concerned that the potential for significant loss of CRP acreages remains, particularly considering the attitudes of Kansas landowners as previously discussed above. The importance of CRP to lesser prairie-chickens, particularly in Kansas, is high and continued loss of CRP within the occupied range would be detrimental to lesser prairie-chicken conservation.

We also remain concerned about the future value of these grasslands to the lesser prairie-chicken. We assume that many of these CRP grasslands that remain in grass after their contract expires could be influenced by factors addressed elsewhere in this proposed rule. Encroachment by woody vegetation, fencing, wind power development, and construction of associated transmission lines have the potential to reduce the value of these areas even if they continue to remain in grass. Unless specific efforts are made to target enrollment of CRP in areas important to lesser prairie-chickens, future enrollments likely will do little to reduce fragmentation or enhance connectivity between existing populations. Considering much of the existing CRP in Kansas was identified as supporting large blocks of suitable habitat, as discussed above, fracturing of these blocks into smaller, less suitable parcels by the threats identified in this proposed rule would reduce the value of these grasslands for lesser prairie-chickens.

In summary, we recognize that lands already converted to cultivated agriculture are located throughout the current and historical range of the lesser prairie-chicken and are, therefore, perpetuating habitat fragmentation within the range of the lesser prairie-chicken. We expect that CRP will continue to provide a means of temporarily restoring cropland to grassland and provide habitat for lesser prairie-chickens where planting mixtures and maintenance activities are appropriate. However, we expect that, in spite of the at least temporary benefits provided by CRP, most of the areas already in agricultural production will remain so into the foreseeable future. While CRP has contributed to restoration of grassland habitats and has influenced abundance and distribution of lesser prairie-chickens in some areas, we expect these lands to be subject to conversion back to cropland as economic conditions change in the foreseeable future possibly reducing the overall benefit of the CRP to the landowner. We do not anticipate that CRP, at current and anticipated funding levels, will cause significant, permanent increases in the extent of native grassland within the range of the lesser prairie-chicken (Coppedge *et al.* 2001, p. 57). Consequently, CRP grasslands alone are not adequate to provide for the long-term persistence of the species, particularly when the known threats to the lesser prairie-chicken are considered cumulatively.

Livestock Grazing

Habitats used by the lesser prairie-chicken are dominated naturally by a diversity of drought-tolerant perennial grasses and shrubs. Grazing has long been an ecological driving force within the ecosystems of the Great Plains (Stebbins 1981, p. 84), and much of the untilled grasslands within the range of the lesser prairie-chicken continue to be grazed by livestock and other animals. The evolutionary history of the mixed-grass prairie has produced endemic bird species adapted to an ever-changing mosaic of lightly to severely grazed grasslands (Bragg and Steuter 1996, p. 54; Knopf and Samson 1997, pp. 277–279, 283). As such, grazing by domestic livestock is not inherently detrimental to lesser prairie-chicken management. However, recent grazing practices have produced habitat conditions that differ in significant ways from the historical mosaic, such as by reducing the amount of ungrazed to lightly grazed habitat. These altered conditions are less suitable for the lesser prairie-chicken (Hamerstrom and Hamerstrom 1961, pp. 289–290; Davis *et al.* 1979, pp. 56, 116; Taylor and Guthery 1980a, p. 2; Bidwell and Peoples 1991, pp. 1–2).

Livestock grazing most clearly affects lesser prairie-chickens when it alters the composition and structure of mixed-grass habitats used by the species. Domestic livestock and native ungulates differentially alter native prairie vegetation, in part through different foraging preferences (Steuter and Hidinger 1999, pp. 332–333; Towne *et al.* 2005, p. 1557). Additionally, domestic livestock grazing, particularly when confined to small pastures, often is managed in ways that produces more uniform utilization of forage and greater total utilization of forage, in comparison to conditions produced historically by free-ranging plains bison (*Bison bison*) herds. For example, grazing by domestic livestock tends to be less patchy, particularly when livestock are confined to specific pastures. Such management practices and their consequences may actually exceed the effect produced by differences in forage preferences (Towne *et al.* 2005, p. 1558) but, in any case, produce an additive effect on plant community characteristics.

The effects of livestock grazing, particularly overgrazing or overutilization, are most readily observed through changes in plant community composition and other vegetative characteristics (Fleischner 1994, pp. 630–631; Stoddart *et al.* 1975, p. 267). Typical vegetative indicators include changes in the composition and proportion of desired plant species and overall reductions in forage. Plant height and density may decline, particularly when plant regeneration is hindered, and community composition shifts to show increased proportions of less desirable species.

Grazing management favorable to persistence of the lesser prairie-chicken must ensure that a diversity of plants and cover types, including shrubs, remain on the landscape (Taylor and Guthery 1980a, p. 7; Bell 2005, p. 4), and that utilization levels leave sufficient cover in the spring to ensure that lesser prairie-chicken nests are adequately concealed from predators (Davis *et al.* 1979, p. 49; Wisdom 1980, p. 33; Riley *et al.* 1992, p. 386; Giesen 1994a, p. 98). Where grazing regimes leave limited residual cover in the spring, protection of lesser prairie-chicken nests may be inadequate and desirable food plants can be scarce (Bent 1932, p. 280; Cannon and Knopf 1980, pp. 73–74; Crawford 1980, p. 3). Because lesser prairie-chickens depend on medium and tall grass species that are preferentially grazed by cattle, in regions of low rainfall, the habitat is easily overgrazed in regard to characteristics needed by lesser prairie-chickens (Hamerstrom and Hamerstrom 1961, p. 290). In addition, when grasslands are in a deteriorated condition due to overgrazing and overutilization, the soils have less water-holding capacity, and the availability of succulent vegetation and insects utilized by lesser prairie-chicken chicks is reduced. Many effects of overgrazing and overutilization on habitat quality are similar to effects produced by drought and likely are exacerbated by actual drought conditions (Davis *et al.* 1979, p. 122; Merchant 1982, pp. 31–33) (see separate discussion under ''Drought'' in ''Extreme Weather Events'' below).

Fencing is a fundamental tool of livestock management but often leads to structural fragmentation of the landscape. Fencing and related structural fragmentation can be particularly detrimental to the lesser prairie-chicken in areas, such as western Oklahoma, where initial settlement patterns favored larger numbers of smaller parcels for individual settlers (Patten *et al.* 2005b, p. 245). Fencing also can cause direct mortality through forceful collisions, by creation of raptor perch sites, and by creation of enhanced movement corridors for predators (Wolfe *et al.* 2007, pp. 96–97, 101). However, not all fences present the same mortality risk to lesser prairie-chickens. Mortality risk would appear to be dependent on factors such as fencing design (height, type, number of strands), landscape topography, and proximity to habitats, particularly leks, used by lesser prairie chickens. Other factors such as the length and density of fences also appear to influence the effects of these structures on lesser prairie-chickens. However, studies on the impacts of different fencing designs and locations with respect to collision mortality in lesser prairie-chickens have not been conducted. Additional discussion related to impacts of collisions with fences and similar linear features are found in the ''Collision Mortality'' section below.

Recent rangeland management includes influential elements besides livestock species selection, grazing levels, and fencing, such as applications of fire (usually to promote forage quality for livestock) and water management regimes (usually to provide water supplies for livestock). Current grazing management strategies are commonly implemented in ways that are vastly different and less variable than historical conditions (Knopf and Sampson 1997, pp. 277–79). These practices have contributed to overall changes in the composition and structure of mixed-grass habitats, often making them less suitable for the lesser prairie-chicken.

Livestock are known to inadvertently flush lesser prairie-chickens and trample lesser prairie-chicken nests. This can cause direct mortality to lesser prairie-chicken eggs or chicks or may cause adults to permanently abandon their nests, again resulting in loss of young. For example, Pitman *et al.* (2006a, pp. 27–29) estimated nest loss from trampling by cattle to be about 1.9 percent of known nests. Additionally, even brief flushings of adults from nests can expose eggs and chicks to predation. Although documented, the significance of direct livestock effects on the lesser prairie-chicken is largely unknown.

Detailed, rangewide information is lacking on the extent, intensity, and forms of recent grazing, and associated effects on the lesser prairie-chicken. However, livestock grazing occurs over such a large portion of the area currently occupied by lesser prairie-chickens that any degradation of habitat it causes is likely to produce population-level impacts on the lesser prairie-chicken. Where uniform grazing regimes have left inadequate residual cover in the spring, detrimental effects to lesser prairie-chicken populations have been observed (Bent 1932, p. 280; Davis *et al.* 1979, pp. 56, 116; Cannon and Knopf 1980, pp. 73–74; Crawford 1980, p. 3; Bidwell and Peoples 1991, pp. 1–2; Riley *et al.* 1992, p. 387; Giesen 1994a, p. 97). Some studies have shown that overgrazing in specific portions of the lesser prairie-chicken's occupied range has been detrimental to the species. Taylor and Guthery (1980a, p. 2) believed overgrazing explained the demise of the lesser prairie-chicken in portions of Texas but thought lesser prairie-chickens could maintain low populations in some areas with high-intensity, long-term grazing. In New Mexico, Patten *et al.* (2006, pp. 11, 16) found that grazing did not have an overall influence on where lesser prairie-chickens occurred within their study areas, but there was some evidence that the species did not nest in portions of the study area subjected to cattle grazing. In some areas within lesser prairie-chicken range, long-term high-intensity grazing results in reduced availability of lightly grazed habitat available to support successful nesting (Jackson and DeArment 1963, p. 737; Davis *et al.* 1979, pp. 56, 116; Taylor and Guthery 1980a, p. 12; Davies 1992, pp. 8, 13).

In summary, domestic livestock grazing (including management practices commonly used to benefit livestock production) has altered the composition and structure of mixed-grass habitats historically used by the lesser prairie-chicken. Much of the remaining remnants of mixed-grass prairie and rangeland, while still important to the lesser prairie-chicken, exhibit conditions quite different from those that prevailed prior to EuroAmerican settlement. These changes have considerably reduced the suitability of remnant areas as habitat for lesser prairie-chickens. Where habitats are no longer suitable for lesser prairie-chicken, these areas can contribute to fragmentation within the landscape even though they may remain in native prairie. Where improper livestock grazing has degraded native grasslands and shrublands, we do not expect those areas to significantly contribute to persistence of the lesser prairie-chicken, particularly when considered cumulatively with the influence of the other known threats.

Collision Mortality

Wire fencing is ubiquitous throughout the Great Plains as the primary means of confining livestock to ranches and pastures or excluding them from areas not intended for grazing, such as CRP lands, agricultural fields, and public roads. As a result, thousands of miles of fencing, primarily barbed wire, have been constructed throughout lesser prairie-chicken range. Like most grassland wildlife throughout the Great Plains, the lesser prairie-chicken evolved in open habitats free of vertical structures or flight hazards, such as linear wires. Until recently, unnatural linear features such as fences, power lines, and similar wire structures were seldom perceived as a significant threat at the population level (Wolfe *et al.* 2007, p. 101). Information on the influence of vertical structures is provided elsewhere in this document.

Mortality of prairie grouse caused by collisions with power lines has been occurring for decades, but the overall extent is largely unmonitored. Leopold (1933, p. 353) mentions a two-cable transmission line in Iowa where the landowner would find as many as a dozen dead or injured greater prairie-chickens beneath the line annually. Prompted by recent reports of high collision rates in species of European grouse (Petty 1995, p. 3; Baines and Summers 1997, p. 941; Bevanger and Broseth 2000, p. 124; Bevanger and Broseth 2004, p. 72) and seemingly unnatural rates of mortality in some local populations of lesser prairie-chicken, the Sutton Center began to investigate collision mortality in lesser prairie-chickens. From 1999 to 2004, researchers recovered 322 carcasses of radio-marked lesser prairie-chickens in New Mexico, Oklahoma, and portions of the Texas panhandle. For lesser prairie-chickens in which the cause of death could be determined, 42 percent of mortality in Oklahoma was attributable to collisions with fences, power lines, or automobiles. In New Mexico, only 14 percent of mortality could be traced to collision. The difference in rates of observed collision between States was attributed to differences in the amount of fencing on the landscape resulting from differential land settlement patterns in the two States (Patten *et al.* 2005b, p. 245).

With between 14 and 42 percent of adult lesser prairie-chicken mortality currently attributable to collision with human-induced structures, Wolfe *et al.* (2007, p. 101) assert that fence collisions will negatively influence long-term population viability for lesser prairie-chickens. Precisely quantifying the scope of the impact of fence collisions rangewide is difficult due to a lack of relevant information. However, we suspect that hundreds of miles of fences are constructed annually within the historical range of the lesser prairie-chicken. Frequently these fences replace existing fence lines and often new fences are constructed. We suspect that only rarely are old fences removed due to labor involved in removing unneeded fences. While we are unable to quantify the amount of new fencing being constructed, collision with fences and other linear features is likely an important source of mortality for lesser prairie-chicken, particularly in some localized areas.

Fence collisions are known to be a significant source of mortality in other grouse. Moss (2001, p. 256) modeled the estimated future population of capercaille grouse (*Tetrao urogallus*) in Scotland and found that, by removing fence collision risks, the entire Scotland breeding population would consist of 1,300 instead of 40 females by 2014. Similarly, recent experiments involving fence marking to increase visibility resulted in a 71 percent overall reduction in grouse collisions in Scotland (Baines and Andrew 2003, p. 174). Additionally, proximity to power lines has been associated with extirpations of Gunnison and greater sage-grouse (Wisdom *et al.* 2011, pp. 467–468).

As previously discussed, collision and mortality risk appears to be dependent on factors such as fencing design (height, type, number of strands), length, and density, as well as landscape topography and proximity of fences to habitats used by lesser prairie-chickens. Although single-strand, electric fences may be a suitable substitute for barbed-wire fences, we have no information demonstrating such is the case. However, marking the top two strands of barbed-wire fences increases their visibility and may help minimize incidence of collision (Wolfe *et al.* 2009, entire).

In summary, power lines and unmarked wire fences are known to cause injury and mortality of lesser prairie-chickens, although the specific rangewide impact on lesser prairie-chickens is largely unquantified. However, the prevalence of fences and power lines within the species' range suggests these structures may have at least localized, if not widespread, detrimental effects. While some conservation programs have emphasized removal of unneeded fences, we believe that, without substantially increased removal efforts, a majority of existing fences will remain on the landscape indefinitely. Existing fences likely operate cumulatively with other mechanisms described in this proposed rule to diminish the ability of the lesser prairie-chicken to persist, particularly in areas with a high density of fences.

Shrub Control and Eradication

Shrub control and eradication are additional forms of habitat alteration that can influence the availability and suitability of habitat for lesser prairie-chickens (Jackson and DeArment 1963, pp. 736–737). Herbicide applications (primarily 2,4–D and tebuthiuron) to reduce or eliminate shrubs from native rangelands is a common ranching practice throughout much of lesser prairie-chicken range, primarily intended to increase forage production for livestock. Through foliar (2,4–D) or pelleted (tebuthiuron) applications, these herbicides are designed to suppress or kill, by repeated defoliation, dicotyledonous plants such as forbs, shrubs, and trees, while causing no significant damage to monocotyledon plants such as grasses.

As defined here, control includes efforts that are designed to have a relatively short-term, temporary effect, generally less than 4 to 5 years, on the target shrub. Eradication consists of efforts intended to have a more long-term or lasting effect on the target shrub. Control and eradication efforts have been applied to both shinnery oak and sand sagebrush dominated habitats, although most shrub control and eradication efforts are primarily focused on shinnery oak. Control or eradication of sand sagebrush occurs within the lesser prairie-chicken range (Rodgers and Sexson 1990, p. 494), but the extent is unknown. Control or eradication of sand sagebrush appears to be more prevalent in other parts of the western United States. Other species of shrubs, such as skunkbush sumac or *Prunus angustifolia* (Chicksaw plum), also have been the target of treatment efforts.

Shinnery oak is toxic to cattle when it first produces leaves in the spring, and it also competes with more palatable grasses and forbs for water and nutrients (Peterson and Boyd 1998, p. 8). In areas where *Gossypium* spp. (cotton) is grown, shinnery oak often is managed for the control of boll weevil (*Anthonomus grandis*), which can destroy cotton crops (Slosser *et al.* 1985, entire). Boll weevils overwinter in areas where large amounts of leaf litter accumulate but tend not to overwinter in areas where grasses predominate (Slosser *et al.* 1985, p. 384). Fire is typically used to remove the leaf litter, and then tebuthiuron, an herbicide, is used to remove shinnery oak (Plains Cotton Growers 1998, pp. 2–3). Prior to the late 1990s, approximately 40,469 ha (100,000 ac) of shinnery oak in New Mexico and 404,685 ha (1,000,000 ac) of shinnery oak in Texas were lost due to the application of tebuthiuron and other herbicides for agriculture and range improvement (Peterson and Boyd 1998, p. 2).

The shinnery oak vegetation type is endemic to the southern Great Plains and is estimated to have historically covered an area of 2.3 million ha (over 5.6 million ac), although its current range has been considerably reduced through eradication (Mayes *et al.* 1998, p. 1609). The distribution of shinnery oak overlaps much of the historical lesser prairie-chicken range in New Mexico, southwestern Oklahoma, and Texas panhandle region (Peterson and Boyd 1998, p. 2). Sand sagebrush tends to be the dominant shrub in lesser prairie-chicken range in Kansas and Colorado as well as portions of northwestern Oklahoma, the northeast Texas panhandle, and northeastern New Mexico.

Once shinnery oak is eradicated, it is unlikely to recolonize treated areas. Shinnery oak is a rhizomatous shrub that reproduces very slowly and does not invade previously unoccupied areas (Dhillion *et al.* 1994, p. 52). Shinnery oak rhizomes do not appear to be viable in sites where the plant was previously eradicated, even decades after treatment. While shinnery oak has been germinated successfully in a laboratory setting (Pettit 1986, pp. 1, 3), little documentation exists that shinnery oak acorns successfully germinate in the wild (Wiedeman 1960, p. 22; Dhillion *et al.* 1994, p. 52). In addition, shinnery oak produces an acorn crop in only about 3 of every 10 years (Pettit 1986, p. 1).

While lesser prairie-chickens are found in Colorado and Kansas where preferred habitats lack shinnery oak, the importance of shinnery oak as a component of lesser prairie-chicken habitat has been demonstrated by several studies (Fuhlendorf *et al.* 2002, pp. 624–626; Bell 2005, pp. 15, 19–25). In a study conducted in west Texas, Haukos and Smith (1989, p. 625) documented strong nesting avoidance by lesser prairie-chickens of shinnery oak rangelands that had been treated with the herbicide tebuthiuron. Similar

behavior was confirmed by three recent studies in New Mexico examining aspects of lesser prairie-chicken habitat use, survival, and reproduction relative to shinnery oak density and herbicide application to control shinnery oak.

First, Bell (2005, pp. 20–21) documented strong thermal selection for and dependency of lesser prairie-chicken broods on dominance of shinnery oak in shrubland habitats. In this study, lesser prairie-chicken hens and broods used sites within the shinnery oak community that had a statistically higher percent cover and greater density of shrubs. Within these sites, microclimate differed statistically between occupied and random sites, and lesser prairie-chicken survival was statistically higher in microhabitat that was cooler, more humid, and less exposed to the wind. Survivorship was statistically higher for lesser prairie-chickens that used sites with greater than 20 percent cover of shrubs than for those choosing 10–20 percent cover; in turn, survivorship was statistically higher for lesser prairie-chickens choosing 10–20 percent cover than for those choosing less than 10 percent cover. Similarly, Copelin (1963, p. 42) stated that he believed the reason lesser prairie-chickens occurred in habitats with shrubby vegetation was due to the need for summer shade.

In a second study, Johnson *et al.* (2004, pp. 338–342) observed that shinnery oak was the most common vegetation type in lesser prairie-chicken hen home ranges. Hens were detected more often than randomly in or near pastures that had not been treated to control shinnery oak. Although hens were detected in both treated and untreated habitats in this study, 13 of 14 nests were located in untreated pastures, and all nests were located in areas dominated by shinnery oak. Areas immediately surrounding nests also had higher shrub composition than the surrounding pastures. This study suggested that herbicide treatment to control shinnery oak adversely impacts nesting lesser prairie-chicken.

Finally, a third study showed that over the course of 4 years and five nesting seasons, lesser prairie-chicken in the core of occupied range in New Mexico distributed themselves non-randomly among shinnery oak rangelands treated and untreated with tebuthiuron (Patten *et al.* 2005a, pp. 1273–1274). Lesser prairie-chickens strongly avoided habitat blocks treated with tebuthiuron but were not influenced by presence of cattle grazing. Further, herbicide treatment explained nearly 90 percent of the variation in occurrence among treated and untreated areas. Over time, radio-collared lesser prairie-chickens spent progressively less time in treated habitat blocks, with almost no use of treated pastures in the fourth year following herbicide application (25 percent in 2001, 16 percent in 2002, 3 percent in 2003, and 1 percent in 2004).

In contrast, McCleery *et al.* (2007, pp. 2135–2136) argued that the importance of shinnery oak habitats to lesser prairie-chickens has been overemphasized, primarily based on occurrence of the species in areas outside of shinnery oak dominated habitats. We agree that shinnery oak may not be a rigorously required component of lesser prairie-chicken habitat rangewide. However, we believe that shrubs are important to lesser prairie-chickens. Recently, Timmer (2012, pp. 38, 73–74) found that lesser prairie-chicken lek density peaked when approximately 50 percent of the landscape was composed of shrubland patches consisting of shrubs less than 5 m (16 ft) tall and comprising at least 20 percent of the total vegetation. Shrubs are an important component of suitable habitat and where shinnery oak occurs, lesser prairie-chickens use it both for food and cover. We believe that where shinnery oak historically, and still currently, occurs, it provides suitable habitat for lesser prairie-chickens. The loss of these habitats likely contributed to observed population declines in lesser prairie-chickens. Mixed-sand sagebrush and shinnery oak rangelands are well documented as preferred lesser prairie-chicken habitat, and long-term stability of shrubland landscapes has been shown to be particularly important to the species (Woodward *et al.* 2001, p. 271).

On BLM lands, where the occurrence of the dunes sagebrush lizard and lesser prairie-chicken overlaps, their Resource Management Plan Amendment (RMPA) states that tebuthiuron may only be used in shinnery oak habitat if there is a 500-m (1,600-ft) buffer around dunes, and that no chemical treatments should occur in suitable or occupied dunes sagebrush lizard habitat (BLM 2008, p. 4–22). In this RMPA (BLM 2008, pp. 16–17), BLM will allow spraying of shinnery oak in lesser prairie-chicken habitat where it does not overlap with the dunes sagebrush lizard. Additionally, the New Mexico State Lands Office and private land owners continue to use tebuthiuron to remove shinnery oak for cattle grazing and other agricultural purposes (75 FR 77809, December 14, 2010). The NRCS's herbicide spraying has treated shinnery oak in at least 39 counties within shinnery oak habitat (Peterson and Boyd 1998, p. 4).

The BLM, through the Restore New Mexico program, also treats mesquite with herbicides to restore grasslands to a more natural condition by reducing the extent of brush. While some improvement in livestock forage occurs, the areas are rested from grazing for two growing seasons and no increase in stocking rate is allowed. Because mesquite is not readily controlled by fire, herbicides often are necessary to treat its invasion. The BLM has treated some 148,257 ha (366,350 ac) and has plans to treat an additional 128,375 ha (317,220 ac). In order to treat encroaching mesquite, BLM aerially treats with a mix of the herbicides Remedy (triclopyr) and Reclaim (clopyralid). Although these chemicals are used to treat the adjacent mesquite, some herbicide drift into shinnery oak habitats can occur during application. Oaks are also included on the list of plants controlled by Remedy, and one use for the herbicide is treatment specifically for sand shinnery oak suppression, as noted on the specimen label (Dow AgroSciences 2008, pp. 5, 7). While Remedy can be used to suppress shinnery oak, depending on the concentration, the anticipated impacts of herbicide drift into non-target areas are expected to be largely short-term due to differences in application rates necessary for the desired treatments. Forbs are also susceptible to Remedy, according to the specimen label, and may be impacted by these treatments, at least temporarily (Dow AgroSciences 2008, p. 2). Typically, shinnery oak and mesquite occurrences don't overlap due to inherent preferences for sandy versus tighter soils. Depending on the density of mesquite, these areas may or may not be used by lesser prairie-chickens prior to treatment.

Lacking germination of shinnery oak acorns, timely recolonization of treated areas, or any established propagation or restoration method, the application of tebuthiuron at rates approved for use in most States can eliminate high-quality lesser prairie-chicken habitat. Large tracts of shrubland communities are decreasing, and native shrubs drive reproductive output for ground-nesting birds in shinnery oak rangelands (Guthery *et al.* 2001, p. 116).

In summary, we conclude that the long-term to permanent removal of shinnery oak is an ongoing threat to the lesser prairie-chicken in New Mexico, Oklahoma, and Texas. Habitat in which shinnery oak is permanently removed may fail to meet basic needs of the species, such as foraging, nesting, predator avoidance, and

thermoregulation. Permanent conversion of shinnery oak and other types of shrubland to other land uses contributes to habitat fragmentation and poses a threat to population persistence.

Insecticides

To our knowledge, no studies have been conducted examining potential effects of agricultural insecticide use on lesser prairie-chicken populations. However, impacts from pesticides to other prairie grouse have been documented. Of approximately 200 greater sage grouse known to be feeding in a block of alfalfa sprayed with dimethoate, 63 were soon found dead, and many others exhibited intoxication and other negative symptoms (Blus *et al.* 1989, p. 1139). Because lesser prairie-chickens are known to selectively feed in alfalfa fields (Hagen *et al.* 2004, p. 72), the Service believes there may be cause for concern that similar impacts could occur. Additionally some control efforts, such as grasshopper suppression in rangelands by the USDA Animal and Plant Health Inspection Service, treat economic infestations of grasshoppers with insecticides. Treatment could cause reductions in insect populations used by lesser prairie-chickens. However, in the absence of more conclusive evidence, we do not currently consider application of insecticides for most agricultural purposes to be a threat to the species.

Altered Fire Regimes and Encroachment by Invasive Woody Plants

Preferred lesser prairie-chicken habitat is characterized by expansive regions of treeless grasslands interspersed with patches of small shrubs (Giesen 1998, pp. 3–4). Prior to extensive EuroAmerican settlement, frequent fires and grazing by large, native ungulates helped confine trees like *Juniperus virginiana* (eastern red cedar) to river and stream drainages and rocky outcroppings. However, settlement of the southern Great Plains altered the historical disturbance regimes and contributed to habitat fragmentation and conversion of native grasslands. The frequency and intensity of these disturbances directly influenced the ecological processes, biological diversity, and patchiness typical of Great Plains grassland ecosystems, which evolved with frequent fire and ungulate herbivory and that provided ideal habitat for lesser prairie-chickens (Collins 1992, pp. 2003–2005; Fuhlendorf and Smeins 1999, pp. 732, 737).

Once these historical fire and grazing regimes were altered, the processes which helped maintain extensive areas of grasslands ceased to operate effectively. Following EuroAmerican settlement, fire suppression allowed trees, like eastern red cedar, to begin invading or encroaching upon neighboring grasslands. Increasing fire suppression that accompanied settlement, combined with government programs promoting eastern red cedar for windbreaks, erosion control, and wildlife cover, increased availability of eastern red cedar seeds in grassland areas (Owensby *et al.* 1973, p. 256). Once established, wind breaks and cedar plantings for erosion control contribute to fragmentation of the prairie landscape. Because eastern red cedar is not well adapted to survive most grassland fires due to its thin bark and shallow roots (Briggs *et al.* 2002b, p. 290), the lack of frequent fire greatly facilitated encroachment by eastern red cedar. Once trees began to invade these formerly treeless prairies, the resulting habitat became increasingly unsuitable for lesser prairie-chickens.

Similar to the effects of artificial vertical structures, the presence of trees causes lesser prairie-chickens to cease using areas of otherwise suitable habitat. Woodward *et al.* (2001, pp. 270–271) documented a negative association between landscapes with increased woody cover and lesser prairie-chicken population indices. Similarly, Fuhlendorf *et al.* (2002, p. 625) examined the effect of landscape structure and change on population dynamics of lesser prairie-chicken in western Oklahoma and northern Texas. They found that landscapes with declining lesser prairie-chicken populations had significantly greater increases in tree cover types (riparian, windbreaks, and eastern red cedar encroachment) than landscapes with sustained lesser prairie-chicken populations.

Tree encroachment into grassland habitats has been occurring for numerous decades, but the extent has been increasing rapidly in recent years. Tree invasion in native grasslands and rangelands has the potential to render significant portions of remaining occupied habitat unsuitable within the future. Once a grassland area has been colonized by eastern red cedar, the trees are mature within 6 to 7 years and provide a plentiful source of seed in which adjacent areas can readily become infested. Although specific information documenting the extent of eastern red cedar infestation within the historical range of the lesser prairie-chicken is unavailable, limited information from Oklahoma and portions of Kansas help demonstrate the significance of this threat to lesser prairie-chicken habitat.

In Riley County, Kansas, within the tallgrass prairie region known as the Flint Hills, the amount of eastern red cedar coverage increased over 380 percent within a 21-year period (Price and Grabow 2010, as cited in Beebe *et al.* 2010, p. 2). In another portion of the Flint Hills of Kansas, transition from a tallgrass prairie to a closed canopy (where tree canopy is dense enough for tree crowns to fill or nearly fill the canopy layer so that light cannot reach the floor beneath the trees) eastern red cedar forest occurred in as little as 40 years (Briggs *et al.* 2002a, p. 581). Similarly, the potential for development of a closed canopy (crown closure) in western Oklahoma is very high (Engle and Kulbeth 1992, p. 304), and eastern red cedar encroachment in Oklahoma is occurring at comparable rates. Estimates developed by NRCS in Oklahoma revealed that some 121,406 ha (300,000 ac) a year are being infested by eastern red cedar (Zhang and Hiziroglu 2010, p. 1033). Stritzke and Bidwell (1989, as cited in Zhang and Hiziroglu 2010, p. 1033) estimated that the area infested by eastern red cedar increased from over 600,000 ha (1.5 million ac) in 1950 to over 1.4 million ha (3.5 million ac) by 1985. By 2002, the NRCS estimated that eastern red cedar had invaded some 3.2 million ha (8 million ac) of prairie and cross timbers habitat in Oklahoma (Drake and Todd 2002, p. 24). Eastern red cedar encroachment in Oklahoma is expected to exceed 5 million ha (12.6 million ac) by 2013 (Zhang and Hiziroglu 2010, p. 1033). While the area infested by eastern red cedar in Oklahoma is not restricted to the historical or occupied range of the lesser prairie-chicken, the problem appears to be the worst in northwestern and southwestern Oklahoma (Zhang and Hiziroglu 2010, p. 1032). Considering that southwestern Kansas and the northeastern Texas panhandle have comparable rates of precipitation, fire exclusion, and grazing pressure as western Oklahoma, this rate of infestation is likely occurring in many areas of occupied and historical lesser prairie-chicken range.

Eastern red cedar is not the only woody species known to be encroaching in prairies used by lesser prairie-chicken. Within the southern- and western-most portions of the historical range in New Mexico and Texas, mesquite is the most common woody invader within these grasslands and can preclude nesting and brood use by lesser prairie-chickens (Riley 1978, p. vii). Mesquite is an ideal woody invader in grassland habitats due to its ability to

produce abundant, long-lived seeds that can germinate and establish in a variety of soil types and moisture and light regimes (Archer *et al.* 1988, p. 123). Much of the remaining historical grasslands and rangelands in the southern portions of the Texas panhandle have been invaded by mesquite.

Although the precise extent and rate of mesquite invasion is difficult to determine rangewide, the ecological process by which mesquite and related woody species invades these grasslands has been described by Archer *et al.* (1988, pp. 111–127) for the Rio Grande Plains of Texas. In this study, once a single mesquite tree colonized an area of grassland, this plant acted as the focal point for seed dispersal of woody species that previously were restricted to other habitats (Archer *et al.* 1988, p. 124). Once established, factors such as overgrazing, reduced fire frequency, and drought interacted to enable mesquite and other woody plants to increase in density and stature on grasslands (Archer *et al.* 1988, p. 112). On their study site near Alice, Texas, they found that woody plant cover significantly increased from 16 to 36 percent between 1941 and 1983, likely facilitated by heavy grazing (Archer *et al.* 1988, p. 120). The study site had a history of heavy grazing since the late 1800s. However, unlike eastern red cedar, mesquite is not as readily controlled by fire. Wright *et al.* (1976, pp. 469–471) observed that mesquite seedlings older than 1.5 years were difficult to control with fire unless they had first been top killed with an herbicide, and the researchers observed that survival of 2- to 3-year-old mesquite seedlings was as high as 80 percent even following very hot fires.

Prescribed burning is often the best method to control or preclude tree invasion of native grassland and rangeland. However, burning of native prairie is often perceived by landowners to be destructive to rangelands, undesirable for optimizing cattle production, and likely to create wind erosion or ''blowouts'' in sandy soils. Often, prescribed fire is employed only after significant invasion has already occurred and landowners consider forage production for cattle to have diminished. Consequently, fire suppression is common, and relatively little prescribed burning occurs on private land. Additionally, in areas where grazing pressure is heavy and fuel loads are reduced, a typical grassland fire may not be intense enough to eradicate eastern red cedar (Briggs *et al.* 2002a, p. 585; Briggs *et al.* 2002b, pp. 293; Bragg and Hulbert 1976, p. 19). Briggs *et al.* (2002a, p. 582) found that grazing reduced potential fuel loads by 33 percent, and the reduction in fuel load significantly reduced mortality of eastern red cedar post-fire. While establishment of eastern red cedar reduces the abundance of herbaceous grassland vegetation, grasslands have a significant capacity to recover rapidly following cedar control efforts (Pierce and Reich 2010, p. 248). However, both Van Auken (2000, p. 207) and Briggs *et al.* (2005, p. 244) stated that expansion of woody vegetation into grasslands will continue to pose a threat to grasslands well into the future.

In summary, invasion of native grasslands by certain woody species like eastern red cedar cause otherwise suitable habitats to no longer be used by lesser prairie-chickens and contribute to fragmentation of native grassland habitats. We expect that efforts to control invasive woody species like eastern red cedar and mesquite will continue but that treatment efforts likely will be insufficient to keep pace with rates of expansion, especially when considering the environmental changes resulting from climate change (see discussion below). Therefore, encroachment by invasive woody plants contributes to further habitat fragmentation and poses a threat to population persistence.

Climate Change

The effects of ongoing and projected changes in climate are appropriate for consideration in our analyses conducted under the Act. The Intergovernmental Panel on Climate Change (IPCC) has concluded that warming of the climate in recent decades is unequivocal, as evidenced by observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global sea level (Solomon *et al.* 2007, p. 1). The term ''climate'', as defined by the IPCC, refers to the mean and variability of different types of weather conditions over time, with 30 years being a typical period for such measurements, although shorter or longer periods also may be used (IPCC 2007a, p. 78). The IPCC defines the term ''climate change'' to refer to a change in the mean or variability of one or more measures of climate (*e.g.,* temperature or precipitation) that persists for an extended period, typically decades or longer, whether the change is due to natural variability, human activity, or both (IPCC 2007a, p. 78).

Scientific measurements spanning several decades demonstrate that changes in climate are occurring and that the rate of change has been faster since the 1950s. Examples include warming of the global climate system and substantial increases in precipitation in some regions of the world and decreases in other regions. (For these and other examples, see IPCC 2007a, p. 30; and Solomon *et al.* 2007, pp. 35–54, 82–85). Results of scientific analyses presented by the IPCC show that most of the observed increase in global average temperature since the mid-20th century cannot be explained by natural variability in climate, and is ''very likely'' (defined by the IPCC as 90 percent or higher probability) due to the observed increase in greenhouse gas concentrations in the atmosphere as a result of human activities, particularly carbon dioxide emissions from use of fossil fuels (IPCC 2007a, pp. 5–6 and figures SPM.3 and SPM.4; Solomon *et al.* 2007, pp. 21–35). Further confirmation of the role of greenhouse gasses comes from analyses by Huber and Knutti (2011, p. 4), who concluded it is extremely likely that approximately 75 percent of global warming since 1950 has been caused by human activities.

Scientists use a variety of climate models, which include consideration of natural processes and variability, as well as various scenarios of potential levels and timing of greenhouse gas emissions, to evaluate the causes of changes already observed and to project future changes in temperature and other climate conditions (*e.g.,* Meehl *et al.* 2007, entire; Ganguly *et al.* 2009, pp. 11555, 15558; Prinn *et al.* 2011, pp. 527, 529). All combinations of models and emissions scenarios yield very similar projections of increases in the most common measure of climate change, average global surface temperature (commonly known as global warming), until about 2030. Although projections of the intensity and rate of warming differ after about 2030, the overall trajectory of all the projections is one of increased global warming through the end of this century, even for the projections based on scenarios that assume that greenhouse gas emissions will stabilize or decline. Thus, there is strong scientific support for projections that warming will continue through the 21st century and that the extent and rate of change will be influenced substantially by the extent of greenhouse gas emissions (IPCC 2007a, pp. 44–45; Meehl *et al.* 2007, pp. 760–764 and 797–811; Ganguly *et al.* 2009, pp. 15555–15558; Prinn *et al.* 2011, pp. 527, 529). (See IPCC 2007b, p. 8, for a summary of other global projections of climate-related changes, such as frequency of heat waves and changes in precipitation. Also, see IPCC (2012, entire) for a summary of observations

and projections of extreme climate events.)

Various changes in climate may have direct or indirect effects on species. These effects may be positive, neutral, or negative, and they may change over time, depending on the species and other relevant considerations, such as interactions of climate with other variables (*e.g.,* habitat fragmentation) (IPCC 2007a, pp. 8–14, 18–19). Identifying likely effects often involves aspects of climate change vulnerability analysis. Vulnerability refers to the degree to which a species (or system) is susceptible to, and unable to cope with, adverse effects of climate change, including climate variability and extremes. Vulnerability is a function of the type, intensity, and rate of climate change and variation to which a species is exposed, its sensitivity, and its adaptive capacity (IPCC 2007a, p. 89; see also Glick *et al.* 2011, pp. 19–22). There is no single method for conducting such analyses that applies to all situations (Glick *et al.* 2011, p. 3). We use our expert judgment and appropriate analytical approaches to weigh relevant information, including uncertainty, in our consideration of various aspects of climate change.

As is the case with all stressors that we assess, even if we conclude that a species is currently affected or is likely to be affected in a negative way by one or more climate-related impacts, it does not necessarily follow that the species meets the definition of an ''endangered species'' or a ''threatened species'' under the Act. If a species is listed as endangered or threatened, knowledge regarding the vulnerability of the species to, and known or anticipated impacts from, climate-associated changes in environmental conditions can be used to help devise appropriate strategies for its recovery.

Some species of grouse have already exhibited significant and measurable negative impacts attributed to climate change. For example, capercaillie grouse in Scotland have been shown to nest earlier than in historical periods in response to warmer springs yet reared fewer chicks (Moss *et al.* 2001, p. 58). The resultant lowered breeding success as a result of the described climactic change was determined to be the major cause of the decline of the Scottish capercaillie (Moss *et al.* 2001, p. 58).

Within the Great Plains, average temperatures have increased and projections indicate this trend will continue over this century (Karl *et al.* 2009, p. 1). Precipitation within the southern portion of the Great Plains is expected to decline, with extreme events such as heat waves, sustained droughts, and heavy rainfall becoming more frequent (Karl *et al.* 2009, pp. 1–2). Seager *et al.* (2007, pp. 1181, 1183–1184) suggests that 'dust bowl' conditions of the 1930s could be the new climatology of the American Southwest, with droughts being much more extreme than most droughts on record.

As a result of changing conditions, the distribution and abundance of grassland bird species will be affected (Niemuth *et al.* 2008, p. 220). Warmer air and surface soil temperatures and decreased soil moisture near nest sites have been correlated with lower survival and recruitment in some ground-nesting birds such as the bobwhite quail (Guthery *et al.* 2001, pp. 113–115) and the lesser prairie-chicken (Bell 2005, pp. 16, 21). On average, lesser prairie-chickens avoid sites that were hotter, drier, and more exposed to the wind (Patten *et al.* 2005a, p. 1275). Specific to lesser prairie chickens, an increased frequency of heavy rainfall events could affect their reproductive success (Lehmann 1941 as cited in Peterson and Silvy 1994, p. 223; Morrow *et al.* 1996, p. 599) although the deleterious effects of increased precipitation have been disputed by Peterson and Silvy (1994, pp. 227–228).

Additionally, more extreme droughts, in combination with existing threats, will have detrimental implications for the lesser prairie-chicken (see Drought discussion in ''Extreme Weather Events'' below). Boal *et al.* (2010, p. 4) suggests that increased temperatures, as projected by climate models, may lead to egg death or nest abandonment of lesser prairie-chickens. Furthermore, the researchers suggest that if lesser prairie-chickens shift timing of reproduction (to later in the year) to compensate for lower precipitation, then temperature impacts could be exacerbated.

In 2010, the Service evaluated three different climate change vulnerability models to determine their usefulness as potential tools for examining the effects of climate change (U.S. Environmental Protection Agency 2009, *draft review;* NatureServe 2010; USDA Rocky Mountain Research Station 2010, *in development*). Outcomes from our assessment of each of these models for the lesser prairie-chicken suggested that the lesser prairie-chicken is highly vulnerable to, and will be negatively affected by, projected climate change. Factors identified in the models that increase the vulnerability of the lesser prairie chicken to climate change include, but are not limited to the following: (1) The species' limited distribution and relatively small declining population, (2) the species' physiological sensitivity to temperature and precipitation change, (3) specialized habitat requirements, and (4) the overall limited ability of the habitats occupied by the species to shift at the same rate as the species in response to climate change.

Increasing temperatures, declining precipitation, and extended, severe drought events would be expected to adversely alter habitat conditions, reproductive success, and survival of the lesser prairie-chicken. While populations of lesser prairie-chicken in the southwestern part of their range are likely to be most acutely affected, populations throughout their range into Colorado and Kansas likely will be impacted as well. Based on current climate change projections of increased temperatures, decreased rainfall, and an increase of severe events such as drought and rainfall within the southern Great Plains, the lesser prairie-chicken is likely to be adversely impacted by the effects of climate changes, especially when considered in combination with other known threats and the anticipated vulnerability of the species.

Additionally, many climate scientists predict that numerous species will shift their geographical distributions in response to warming of the climate (McLaughlin *et al.* 2002, p. 6070). In mountainous areas, species may shift their range altitudinally, in flatter areas, ranges may shift lattitudinally (Peterson 2003, p. 647). Such shifts may result in localized extinctions over portions of the range, and, in other portions of their distributions, the occupied range may expand, depending upon habitat suitability. Changes in geographical distributions can vary from subtle to more dramatic rearrangements of occupied areas (Peterson 2003, p. 650). Species occupying flatland areas such as the Great Plains generally were expected to undergo more severe range alterations than those in montane areas (Peterson 2003, p. 651). Additionally, populations occurring in fragmented habitats can be more vulnerable to effects of climate change and other threats, particularly for species with limited dispersal abilities (McLaughlin *et al.* 2002, p. 6074). Species inhabiting relatively flat lands will require corridors that allow north-south movements, presuming suitable habitat exists in these areas. Where existing occupied range is bounded by areas of unsuitable habitat, the species' ability to move into suitable areas is reduced and the amount of occupied habitat could shrink accordingly. In some cases, particularly when natural movement has a high probability of failure, assisted migration

may be necessary to ensure populations persist ((McLachlan *et al.* 2007, entire).

We do not currently know how the distribution of lesser prairie-chickens may change geographically under anticipated climate change scenarios. Certainly the presence of suitable grassland habitats created under CRP may play a key role in how lesser prairie-chickens respond to the effects of climate change. Additionally, species that are insectivorous throughout all or a portion of their life cycle, like the lesser prairie-chicken, may have increased risks where a phenological mismatch exists between their biological needs and shifts in insect abundance due to vulnerability of insects to changes in thermal regimes (Parmesan 2006, pp. 638, 644, 657; McLachlan *et al.* 2011. p. 5). McLachlan *et al.* (2011, pp. 15, 26) predicted that lesser prairie-chicken carrying capacity would decline over the next 60 years due to climate change, primarily the result of decreased vegetation productivity (reduced biomass); however, they could not specifically quantify the extent of the decline. They estimated the current carrying capacity to be 49,592 lesser prairie-chickens (McLachlan *et al.* 2011, p. 25). Based on their analysis, McLachlan *et al.* (2011, p. 29) predicted that the lesser prairie-chicken may be facing significant challenges to long-term survival over the next 60 years due to climate-related changes in native grassland habitat. We anticipate that climate-induced changes in ecosystems, including grassland ecosystems used by lesser prairie-chickens, coupled with ongoing habitat loss and fragmentation will interact in ways that will amplify the individual negative effects of these and other threats identified in this proposed rule (Cushman *et al.* 2010, p. 8).

Extreme Weather Events

Weather-related events such as drought and hail storms influence habitat quality or result in direct mortality of lesser prairie-chicken. Although hail storms typically only have a localized effect, the effects of snow storms and drought can often be more wide-spread and can affect considerable portions of the occupied range.

Drought—Drought is considered a universal ecological driver across the Great Plains (Knopf 1996, p. 147). Annual precipitation within the Great Plains is considered highly variable (Wiens 1974a, p. 391) with prolonged drought capable of causing local extinctions of annual forbs and grasses within stands of perennial species, and recolonization is often slow (Tilman and El Haddi 1992, p. 263). Net primary production in grasslands is strongly influenced by annual precipitation patterns (Sala *et al.* 1988, pp. 42–44; Weltzin *et al.* 2003. p. 944) and drought, in combination with other factors, is thought to limit the extent of shrubby vegetation within grasslands (Briggs *et al.* 2005, p. 245). Grassland bird species, in particular, are impacted by climate extremes such as extended drought, which acts as a bottleneck that allows only a few species to survive through the relatively harsh conditions (Wiens 1974a, pp. 388, 397; Zimmerman 1992, p. 92). Drought also can influence many of the factors previously addressed in this proposed rule, such as exaggerating and prolonging the effect of fires and overgrazing.

The Palmer Drought Severity Index (Palmer 1965, entire) is a measure of the balance between moisture demand (evapotranspiration driven by temperature) and moisture supply (precipitation) and is widely used as an indicator of the intensity of drought conditions (Alley 1984, entire). This index is standardized according to local climate (*i.e.,* climate divisions established by the National Oceanic and Atmospheric Administration) and is most effective in determining magnitude of long-term drought occurring over several months. The index uses zero as normal with drought shown in terms of negative numbers. Positive numbers imply excess precipitation.

The droughts of the 1930s and 1950s are some of the most severe on record (Schubert *et al.* 2004, p. 485). During these periods, the Palmer Drought Severity Index exceeded negative 4 and 5 in many parts of the Great Plains, which would be classified as extreme to exceptional drought. The drought that impacted much of the occupied lesser prairie-chicken range in 2011 also was classified as severe to extreme, particularly during the months of May through August (National Climatic Data Center 2012). This time period is significant because the period of May through September generally overlaps the lesser prairie-chicken nesting and brood-rearing season. Review of the available records for the Palmer Drought Severity Index during the period from May through September 2011, for many of the climate divisions within the lesser prairie-chicken occupied range, revealed that the index exceeded negative 4 over most of the occupied range. Climate division 4 in westcentral Kansas was the least impacted by drought in 2011, with a Palmer Drought Severity Index of negative 2.29. The most severe drought occurred in the Texas panhandle.

Based on an evaluation of the Palmer Drought Severity Index for May through July of 2012, several of the climate divisions which overlap the occupied range are currently experiencing extreme to exceptional drought. Colorado, New Mexico, and Texas are experiencing the worst conditions, based on index values varying from a low of negative 5.8 in Colorado to a high index value of negative 4.1 in Texas and New Mexico. Drought is least severe in Oklahoma, although climate division 4 is currently at negative 2.4. Index values for Kansas are in the severe range and vary from negative 2.7 to negative 3.3. Such persistent drought conditions will impact vegetative cover for nesting and can reduce insect populations needed by growing chicks. Additionally, drought impacts forage needed by livestock and continued grazing under such conditions can rapidly degrade native rangeland.

During times of severe to extreme drought, suitable livestock forage may become unavailable or considerably reduced due to a loss of forage production on existing range and croplands. Through provisions of the CRP, certain lands under existing contract can be used for emergency haying and grazing, provided specific conditions are met, to help relieve the impacts of drought by temporarily providing livestock forage. Typically, emergency haying and grazing is allowed only on those lands where appropriate Conservation Practices (CP), already approved for managed haying and grazing, have been applied to the CRP field. For example, CRP fields planted to either introduced grasses (CP–1) or native grasses (CP–2) are eligible. However, during the widespread, severe drought of 2012, some additional CPs that were not previously eligible to be hayed or grazed were approved for emergency haying and grazing only during 2012. Typically any approved emergency haying or grazing must occur outside of the primary nesting season. The duration of the emergency haying can be no longer than 60 calendar days, and the emergency grazing period cannot extend beyond 90 calendar days, and both must conclude by September 30th of the current growing season. Generally areas that were emergency hayed or grazed in 1 year are not eligible the following 2 years. Other restrictions also may apply.

In most years, the amounts of land that are hayed or grazed are low, typically less than 15 percent of eligible acreage, likely because the producer must take a 25 percent reduction in the annual rental payment, based on the amount of lands that are hayed or

grazed. However, during the 2011 drought, requests for emergency haying and grazing were larger than previously experienced. For example, in Oklahoma, more than 103,200 ha (255,000 ac) or roughly 30 percent of the available CRP lands statewide were utilized. Within those counties that encompass the occupied range, almost 55,400 ha (137,000 ac) or roughly 21 percent of the available CRP in those counties were hayed or grazed. In Kansas, there were almost 95,900 ha (237,000 ac) under contract for emergency haying or grazing within the occupied range. The number of contracts for emergency haying and grazing within occupied range is about 18 percent of the total number of contracts within occupied range. Within New Mexico in 2011, there were approximately 25,900 ha (64,100 ac) under contract for emergency grazing, 97 percent of which were in counties that are either entirely or partially within the historical range of the lesser prairie-chicken. Texas records do not differentiate between managed CRP grazing and haying and that conducted under emergency provisions. Within the historical range in 2011, some 65 counties had CRP areas that were either hayed or grazed. The average percent of areas used was 22 percent. Within the occupied counties, the average percent grazed was the same, 22 percent.

As of the close of July 2012, the entire occupied and historical range of the lesser prairie-chicken was classified as abnormally dry or worse (Farm Service Agency 2012, p. 14). The abnormally dry category roughly corresponds to a Palmer Drought Index of minus 1.0 to minus 1.9. Based on new provisions announced by USDA on July 23, 2012, the entire historical and currently occupied range of the lesser prairie-chicken is eligible for emergency haying and grazing. Additionally, the reduction in the annual rental payment has been reduced from 25 percent to 10 percent. Although the actual extent of emergency haying and grazing that occurs will not be known until after September 30, 2012, we expect that the effect will be significant. The extent of emergency haying in the 2012 season and its impact on lesser prairie-chicken habitat will be analyzed as part of our final listing determination. In many instances, areas that were grazed or hayed under the emergency provisions of 2011 have not recovered due to the influence of the ongoing drought. Additionally, current provisions will allow additional fields to be eligible for emergency haying and grazing that have previously not been eligible, including those classified as rare and declining habitat (CP–25). Conservation Practice 25 provides for very specific habitat components beneficial to ground-nesting birds such as lesser prairie-chickens. The overall extent of relief provided to landowners could result in more widespread implementation of the emergency provisions than has been observed in previous years. Widespread haying and grazing of CRP under drought conditions may compromise the ability of these grasslands to provide year-round escape cover and thermal cover during winter, at least until normal precipitation patterns return (see sections ''Summary of Recent and Ongoing Conservation Actions'' and ''Conservation Reserve Program'' for additional information related to CRP).

Although the lesser prairie-chicken has adapted to drought as a component of its environment, drought and the accompanying harsh, fluctuating conditions have influenced lesser prairie-chicken populations. Following extreme droughts of the 1930s and 1950s, lesser prairie-chicken population levels declined and a decrease in their overall range was observed (Lee 1950, p. 475; Schwilling 1955, pp. 5–6; Hamerstrom and Hamerstrom 1961, p. 289; Copelin 1963, p. 49; Crawford 1980, pp. 2–5; Massey 2001, pp. 5, 12; Hagen and Giessen 2005, unpaginated; Ligon 1953 *as cited in* New Mexico Lesser Prairie Chicken/Sand Dune Lizard Working Group 2005, p. 19). More recently, a reduction in lesser prairie-chicken population indices was documented after drought conditions in 2006 followed by severe winter conditions in 2006 and early 2007. For example, Rodgers (2007b, p. 3) stated that lesser prairie-chicken lek indices from surveys conducted in Hamilton County, Kansas, declined by nearly 70 percent from 2006 levels and were the lowest on record. In comparison to the 2011 drought, the Palmer Drought Severity Index for the May through September period in Kansas during the 2006 drought was minus 2.83 in climate division 4 and minus 1.51 in climate division 7. Based on the Palmer Drought Severity Index, drought conditions in 2011 were slightly worse than those observed in 2006.

Drought impacts the lesser prairie-chicken through several mechanisms. Drought affects seasonal growth of vegetation necessary to provide suitable nesting and roosting cover, food, and opportunity for escape from predators (Copelin 1963, pp. 37, 42; Merchant 1982, pp. 19, 25, 51; Applegate and Riley 1998, p. 15; Peterson and Silvy 1994, p. 228; Morrow *et al.* 1996, pp. 596–597). Lesser prairie-chicken home ranges will temporarily expand during drought years (Copelin 1963, p. 37; Merchant 1982, p. 39) to compensate for scarcity in available resources. During these periods, the adult birds expend more energy searching for food and tend to move into areas with limited cover in order to forage, leaving them more vulnerable to predation and heat stress (Merchant 1982, pp. 34–35; Flanders-Wanner *et al.* 2004, p. 31). Chick survival and recruitment may also be depressed by drought (Merchant 1982, pp. 43–48; Morrow 1986, p. 597; Giesen 1998, p. 11; Massey 2001, p. 12), which likely affects population trends more than annual changes in adult survival (Hagen 2003, pp. 176–177). Drought-induced mechanisms affecting recruitment include decreased physiological condition of breeding females (Merchant 1982, p. 45); heat stress and water loss of chicks (Merchant 1982, p. 46); and effects to hatch success and juvenile survival due to changes in microclimate, temperature, and humidity (Patten *et al.* 2005a, pp. 1274–1275; Bell 2005, pp. 20–21; Boal *et al.* 2010, p. 11). Precipitation, or lack thereof, appears to affect lesser prairie-chicken adult population trends with a potential lag effect (Giesen 2000, p. 145). That is, rain in one year promotes more vegetative cover for eggs and chicks in the following year, which enhances their survival.

Although lesser prairie-chickens have persisted through droughts in the past, the effects of such droughts are exacerbated by 19th–21st century land use practices such as heavy grazing, overutilization, and land cultivation (Merchant 1982, p. 51; Hamerstrom and Hamerstrom 1961, pp. 288–289; Davis *et al.* 1979, p. 122; Taylor and Guthery 1980a, p. 2), which have altered and fragmented existing habitats. In past decades, fragmentation of lesser prairie-chicken habitat likely was less extensive than current conditions, and connectivity between occupied habitats was more prevalent, allowing populations to recover more quickly. As lesser prairie-chicken populations decline and become more fragmented, their ability to rebound from prolonged drought is diminished. This reduced ability to recover from drought is particularly concerning given that future climate projections suggest that droughts will only become more severe. Projections based on an analysis using 19 different climate models revealed that southwestern North America, including the entire historical range of the lesser prairie-chicken, will consistently become drier throughout

the 21st century (Seager *et al.* 2007, p. 1181). Severe droughts should continue into the future, particularly during persistent La Niña events, but they are anticipated to be more severe than most droughts on record (Seager *et al.* 2007, pp. 1182–1183).

Storms—Very little published information is available on the effects of certain isolated weather events, like storms, on lesser prairie-chicken. However, hail storms are known to cause mortality of prairie grouse, particularly during the spring nesting season. Fleharty (1995, p. 241) provides an excerpt from the May 1879 Stockton News that describes a large hailstorm near Kirwin, Kansas, as responsible for killing prairie-chickens (likely greater prairie-chicken) and other birds by the hundreds. In May of 2008, a hailstorm was known to have killed six lesser prairie-chickens in New Mexico. Although such phenomena are undoubtedly rare, the effects can be significant, particularly if they occur during the nesting period. We are especially interested in documenting the occurrence and significance of such events on the lesser prairie-chicken.

A severe winter snowstorm in 2006, centered over southeastern Colorado, resulted in heavy snowfall, no cover, and little food in southern Kiowa, Prowers, and most of Baca Counties for over 60 days. The storm was so severe that more than 10,000 cattle died in Colorado alone from this event, in spite of the efforts of National Guard and other flight missions that used cargo planes and helicopters to drop hay to stranded cattle (Che *et al.* 2008, pp. 2, 6). Lesser prairie-chicken numbers in Colorado experienced a 75 percent decline from 2006 to 2007, from 296 birds observed to only 74. Active leks also declined from 34 leks in 2006 to 18 leks in 2007 (Verquer 2007, p. 2). Most strikingly, no active leks have been detected since 2007 in Kiowa County, which had six active leks in the several years prior to the storm. The impacts of the severe winter weather, coupled with drought conditions observed in 2006, probably account for the decline in the number of lesser prairie-chickens observed in 2007 in Colorado (Verquer 2007, pp. 2–3).

In summary, extreme weather events can have a significant impact on individual populations of lesser prairie-chickens. These impacts are especially significant in considering the status of the species as a whole if the impacted population is isolated from individuals in other nearby populations that may be capable of recolonizing or supplementing the impacted population.

Wind Power and Energy Transmission Operation and Development

Wind power is a form of renewable energy that is increasingly being used to meet electricity demands in the United States. The U.S. Energy Information Administration has estimated that the demand for electricity in the United States will grow by 39 percent between 2005 and 2030 (U.S. Department of Energy (DOE) 2008, p. 1). Wind energy, under one scenario, would provide 20 percent of the United States' estimated electricity needs by 2030 and require at least 250 gigawatts of additional land-based wind power capacity to achieve predicted levels (DOE 2008, pp. 1, 7, 10). The forecasted increase in production would require some 125,000 turbines based on the existing technology and equipment in use and assuming a turbine has a generating capacity of 2 megawatts (MW). Achieving these levels also would require expansion of the current electrical transmission system. Financial incentives, including grants and tax relief, are available to help encourage development of renewable energy sources.

Wind farm development begins with site monitoring and collection of meteorological data to characterize the available wind regime. Turbines are installed after the meteorological data indicate appropriate siting and spacing. The tubular towers of most commercial, utility-scale onshore wind turbines are between 65 m (213 ft) and 100 m (328 ft) tall. The most common system uses three rotor blades and can have a diameter of as much as 100 m (328 ft). The total height of the system is measured when a turbine blade is in the 12 o'clock position and will vary depending on the length of the blade. With blades in place, a typical system will easily exceed 100 m (328 ft) in height. A wind farm will vary in size depending on the size of the turbines and amount of land available. Typical wind farm arrays consist of 30 to 150 towers each supporting a single turbine. The individual permanent footprint of a single turbine unit, about 0.3 to 0.4 ha (0.75 to 1 ac), is relatively small in comparison with the overall footprint of the entire array (DOE 2008, pp. 110–111). Spacing between each turbine is usually 5 to 10 rotor diameters to avoid interference between turbines. Roads are necessary to access the turbine sites for installation and maintenance. One or more substations, where the generated electricity is collected and transmitted, also may be built depending on the size of the wind farm. The service life of a single turbine is at least 20 years (DOE 2008, p. 16).

Siting of commercially viable wind energy developments is largely based on wind intensity and consistency, and requires the ability to transmit generated power to the users. Any discussion of the effects of wind energy development on the lesser prairie-chicken also must take into consideration the influence of the transmission lines critical to distribution of the energy generated by wind turbines. Transmission lines can traverse long distances across the landscape and can be both above ground and underground. Most of the impacts associated with transmission lines are with the aboveground systems. Support structures vary in height depending on the size of the line. Most high-voltage powerline towers are 30 to 38 m (98 to 125 ft) high but can be higher if the need arises. Local distribution lines are usually much shorter in height but can still contribute to fragmentation of the landscape. Financial investment in the transmission of electrical power has been steadily climbing since the late 1990s and includes not only the cost of maintaining the existing system but also includes costs associated with increasing reliability and development of new transmission lines (DOE 2008, p. 94). Manville (2005, p. 1052) reported that there are at least 804,500 km (500,000 mi) of transmission lines (lines carrying greater than 115 kilovolts (kV)) within the United States. Recent transmission-related activities within the historical range include the creation of Competitive Renewable Energy Zones in Texas and the ''X plan'' under consideration by the Southwest Power Pool.

All 5 lesser prairie-chicken States are within the top 12 States nationally for potential wind capacity, with Texas ranking second for potential wind energy capacity and Kansas ranking third (American Wind Energy Association 2012b, entire). The potential for wind development within the historical range of the lesser prairie-chicken is apparent from the wind potential estimates developed by the DOE's National Renewable Energy Laboratory and AWS Truewind. These estimates present the predicted mean annual wind speeds at a height of 80 m (262 ft). Areas with an average wind speed of 6.5 m/s (21.3 ft/s) and greater at a height of 80 m (262 ft) are generally considered to have a suitable wind resource for development. All of the historical and current range of the lesser prairie-chicken occurs in areas determined to have 6.5 m/s (21.3 ft/s) or higher average windspeed (DOE National Renewable Energy Laboratory

2010b, p. 1). The vast majority of the occupied range lies within areas of 7.5 m/s (24.6 ft/s) or higher windspeeds.

Wind energy developments already exist within the historical range of the lesser prairie-chicken, some of which have impacted occupied habitat. The 5 lesser prairie-chicken States are all within the top 20 States nationally for installed wind capacity (American Wind Energy Association 2012a, p. 6). By the close of 1999, the installed capacity, in MW, of wind power facilities within the five lesser prairie-chicken States was 209 MW; the majority, 184 MW, was provided by the State of Texas (DOE National Renewable Energy Laboratory 2010a, p. 1). At the close of the first quarter of 2012, the installed capacity within the five lesser prairie-chicken States had grown to 16,516 MW (American Wind Energy Association 2012a, p. 7). Although not all of this installed capacity is located within the historical range of the lesser prairie-chicken, and includes offshore wind projects in Texas, there is considerable overlap between the historical range and those areas having good to excellent wind potential, as determined by the DOE's National Renewable Energy Laboratory (DOE National Renewable Energy Laboratory 2010b, p. 1). Areas having good to excellent wind potential represent the highest priority sites for wind power development.

Within the estimated occupied range in Colorado, existing wind projects are located in Baca, Bent, and Prowers Counties. Colorado's installed wind capacity grew by 39 percent in 2011 (American Wind Energy Association 2012b, entire). In Kansas, Barber, Ford, Gray, Kiowa, and Wichita Counties have existing wind projects. Kansas is expected to double their existing capacity in 2012 and leads the United States with the most wind power under construction (American Wind Energy Association 2012b, entire). Curry, Roosevelt, and Quay Counties in the New Mexico portion of the estimated occupied range currently have operating wind projects. There are some 14,136 MW (roughly 5,654 2.5 MW turbines) in the queue awaiting construction (American Wind Energy Association 2012b, entire). In Oklahoma, Custer, Dewey, Harper, Roger Mills, and Woodward Counties have existing wind farms. Some 393 MW are under construction and there is another 14,667 MW in the queue awaiting construction. In Texas, no wind farms have been constructed within the currently occupied counties (American Wind Energy Association 2012b, entire).

Most published literature on the effects of wind development on birds focuses on the risks of collision with towers or turbine blades. Until recently, there was very little published research specific to the effects of wind turbines and transmission lines on prairie grouse and much of that focuses on avoidance of the infrastructure associated with renewable energy development (see previous discussion on vertical structures in the ''Causes of Habitat Fragmentation Within Lesser Prairie-Chicken Range'' section above and discussion that follows). We suspect that many wind power facilities are not monitored consistently enough to detect collision mortalities and the observed avoidance of and displacement influenced by the vertical infrastructure observed in prairie grouse likely minimizes the opportunity for such collisions to occur. However, Vodenal *et al.* (2011, unpaginated) has observed both greater prairie-chickens and plains sharp-tailed grouse (*Tympanuchus phasianellus jamesi*) lekking near the Ainsworth Wind Energy Facility in Nebraska since 2006. The average distance of the observed display grounds to the nearest wind turbine tower was 1,430 m (4,689 ft) for greater prairie-chickens and 1,178 m (3,864 ft) for sharp-tailed grouse.

While both lesser and greater prairie-chickens appear to be more tolerant of these structures than some other species of prairie grouse, Hagen (2004, p. 101) cautions that occurrence near these structures may be due to strong site fidelity or continued use of suitable habitat remnants and that these populations actually may not be able to sustain themselves without immigration from surrounding populations (*i.e.,* population sink).

Currently, we have no documentation of any collision-related mortality in wind farms for lesser prairie-chickens. Similarly, no deaths of gallinaceous birds (upland game birds) were reported in a comprehensive review of avian collisions and wind farms in the United States; the authors hypothesized that the average tower height and flight height of grouse minimized the risk of collision (Erickson *et al.* 2001, pp. 8, 11, 14, 15). However, Johnson and Erickson (2011, p. 17) monitored commercial scale wind farms in the Columbia Plateau of Washington and Oregon and observed that about 13 percent of the observed collision mortalities were nonnative upland game birds: Ring-necked pheasant, gray partridge (*Perdix perdix*), and chukar (*Alectoris chukar*). Although the risk of collision with individual wind turbines appears low, commercial wind energy developments can directly alter existing habitat, contribute to habitat and population fragmentation, and cause more subtle alterations that influence how species use habitats in proximity to these developments (National Research Council 2007, pp. 72–84).

Electrical transmission lines can directly affect prairie grouse by posing a collision hazard (Leopold 1933, p. 353; Connelly *et al.* 2000, p. 974; Patten *et al.* 2005b, pp. 240, 242) and can indirectly lead to decreased lek recruitment, increased predation, and facilitate invasion by nonnative plants. The physical footprint of the actual project is typically much smaller than the actual impact of the transmission line itself. Lesser prairie-chickens exhibit strong avoidance of tall vertical features such as utility transmission lines (Pitman *et al.* 2005, pp. 1267–1268). In typical lesser prairie-chicken habitat where vegetation is low and the terrain is relatively flat, power lines and power poles provide attractive hunting, loafing, and roosting perches for many species of raptors (Steenhof *et al.* 1993, p. 27). The elevated advantage of transmission lines and power poles serve to increase a raptor's range of vision, allow for greater speed during attacks on prey, and serve as territorial markers. Raptors actively seek out power lines and poles in extensive grassland areas where natural perches are limited. While the effect of this predation on lesser prairie-chickens undoubtedly depends on raptor densities, as the number of perches or nesting features increase, the impact of avian predation will increase. Additional discussion concerning the influence of vertical structures on predation of lesser prairie-chickens can be found in the ''Causes of Habitat Fragmentation Within Lesser Prairie-Chicken Range'' section above, and additional information on predation is provided in a separate discussion under *''Predation''* below.

Transmission lines, particularly due to their length, can be a significant barrier to dispersal of prairie grouse, disrupting movements to feeding, breeding, and roosting areas. Both lesser and greater prairie-chickens avoided otherwise suitable habitat near transmission lines and crossed these power lines much less often than nearby roads, suggesting that power lines are a particularly strong barrier to movement (Pruett *et al.* 2009a, pp. 1255–1257). Because lesser prairie-chickens avoid tall vertical structures like transmission lines and because transmission lines can increase predation rates, leks located in the vicinity of these structures may see reduced recruitment of new males to the

lek (Braun *et al.* 2002, pp. 339–340, 343–344). Lacking recruitment, leks may disappear as the number of older males decline due to death or emigration. Linear corridors such as road networks, pipelines, and transmission line rights-of-way can create soil conditions conducive to the spread of invasive plant species, at least in semiarid sagebrush habitats (Knick *et al.* 2003, p. 619; Gelbard and Belnap 2003, pp. 424–425), but the scope of this impact within the range of the lesser prairie-chicken is unknown. Spread of invasive plants is most critical where established populations of invasive plants begin invading areas of native grassland vegetation.

Electromagnetic fields associated with transmission lines alter the behavior, physiology, endocrine systems, and immune function in birds, with negative consequences on reproduction and development (Fernie and Reynolds 2005, p. 135). Birds are diverse in their sensitivities to electromagnetic field exposure with domestic chickens known to be very sensitive. Although many raptor species are less affected by these fields (Fernie and Reynolds 2005, p. 135), no specific studies have been conducted on lesser prairie-chickens. However electromagnetic fields associated with powerlines and telecommunication towers may explain, at least in part, avoidance of such structures by sage grouse (Wisdom *et al.* 2011, pp. 467–468).

Identification of the actual number of proposed wind energy projects that will be built in any future timeframe is difficult to accurately discern. An analysis of the Federal Aviation Administration's obstacle database provides some insight into the number of existing and proposed wind generation towers. The Federal Aviation Administration is responsible for ensuring wind towers and other vertical structures are constructed in a manner that ensures the safety and efficient use of the navigable airspace. In accomplishing this mission, they evaluate applications submitted by the party responsible for the proposed construction and alteration of these structures. Included in the application is information on the precise location of the proposed structure. This information can be used, in conjunction with other databases, to determine the number of existing and proposed wind generation towers within the historical and occupied range of the lesser prairie-chicken. Analysis of this information, as available in April 2010, reveals that 6,279 constructed towers are within the historical range of the lesser prairie-chicken. Some 8,501 towers have been approved for construction, and another 1,693 towers were pending approval within the historical range of the lesser prairie-chicken. While not all of these structures are wind generation towers, the vast majority are. Other structures included within the database are radio, meteorological, telecommunication, and similar types of towers.

A similar analysis was conducted on lesser prairie-chicken occupied range. As of April 2010, the occupied range included 173 towers. Some 1,950 towers had been approved for construction, and another 250 towers were awaiting approval. In January of 2012, the Federal Aviation Administration's obstacle database showed that there are some 405 existing wind turbines in or within 1.6 km (1 mi) of the estimated occupied range. In March of 2012, there were 4,887 wind turbines awaiting construction, based on this database. Additionally, the Southwest Power Pool provides public access to its Generation Interconnection Queue (*https://studies.spp.org/GenInterHomePage.cfm*), which provides all of the active requests for connection from new energy generation sources requiring Southwest Power Pool approval prior to connecting with the transmission grid. The Southwest Power Pool is a regional transmission organization which overlaps all or portions of nine States and functions to ensure reliable supplies of power, adequate transmission infrastructure, and competitive wholesale prices of electricity exist. In 2010, within the Southwest Power Pool portion of Kansas, New Mexico, Oklahoma, and Texas, there were 177 wind generation interconnection study requests totaling 31,883 MW awaiting approval. A maximum development scenario, assuming all of these projects are built and they install all 2.3 MW wind turbines, would result in approximately 13,862 wind turbines being erected in these four States.

The possible scope of this anticipated wind energy development on the status of the lesser prairie-chicken can readily be seen in Oklahoma where the locations of many of the current and historically occupied leks are known. Most remaining large tracts of untilled native rangeland, and hence lesser prairie-chicken habitat, occur on topographic ridges. Leks, the traditional mating grounds of prairie grouse, are consistently located on elevated grassland sites with few vertical obstructions (Flock 2002, p. 35). Because of the increased elevation, these ridges also are prime sites for wind turbine development. In cooperation with ODWC, Service personnel in 2005 quantified the potential degree of wind energy development in relation to existing populations of lesser prairie-chicken in Oklahoma. Using ArcView mapping software, all active and historical lesser prairie-chicken lek locations in Oklahoma, as of the mid 1990s (n = 96), and the current occupied range, were compared with the Oklahoma Neural Net Wind Power Development Potential Model map created by the Oklahoma Wind Power Assessment project. The mapping analysis revealed that 35 percent of the recently occupied range in Oklahoma is within areas designated by the Oklahoma Wind Power Assessment as ''excellent'' for wind energy development. When both the ''excellent'' and ''good'' wind energy development classes are combined, some 55 percent of the lesser prairie-chicken's occupied range in Oklahoma lies within those two classes.

When leks were examined, the same analysis revealed a nearly complete overlap on all known active and historical lek locations, based on the known active leks during the mid 1990s. Roughly 91 percent of the known lesser prairie-chicken lek sites in Oklahoma are within 8 km (5 mi) of land classified as ''excellent'' for wind development (O'Meilia 2005). Over half (53 percent) of all known lek sites in Oklahoma occur within 1.6 km (1 mi) of lands classified as ''excellent'' for commercial wind energy development. This second metric is particularly relevant given the average home range for a lesser prairie-chicken is about 10 sq km (4 sq mi) and that a majority of lesser prairie-chicken nesting generally occurs, on average, within 3.4 km (2.1 mi) of active leks (Hagen and Giesen 2005, p. 2). Using Robel's (2002) estimate derived for the greater prairie-chicken of the zone of avoidance for a single commercial-scale wind turbine (1.6 km or 1 mi), development of commercial wind farms likely will have a significant adverse influence on reproduction of the lesser prairie-chicken, provided lesser prairie-chickens avoid nesting within 1.6 km (1 mi) of each turbine.

Unfortunately, similar analyses are not available for the other States due to a lack of comparable information on the location of lek sites. Considering western Kansas currently supports the largest number and distribution of lesser prairie-chickens of all five States, the influence of wind energy development on the lesser prairie-chicken in Kansas would likely be just as significant. In 2006, the Governor of Kansas initiated the Governor's 2015 Renewable Energy Challenge, an objective of which is to have 1,000 MW of renewable energy

capacity in Kansas by 2015 (Cita *et al.* 2008, p. 1). A cost-benefit study (Cita *et al.* 2008, Appendix B) found that wind power was the most likely and most cost effective form of renewable energy resource for Kansas. Modestly assuming an average of 2 MW per turbine—most commercial scale turbines are between 1.5 and 2.5 MW—some 500 turbines would be erected in Kansas if this goal is to be met.

While not all of those turbines would be placed in occupied habitat, and some overlap in avoidance would occur if turbines were oriented in a typical wind farm array, the potential impact could be significant. First, the best wind potential in Kansas occurs in the western two-thirds of the State and largely overlaps the currently occupied lesser prairie-chicken range (DOE, National Renewable energy Laboratory 2010b, p. 1). Additionally, Kansas has a voluntary moratorium on the development of wind power in the Flint Hills of eastern Kansas, which likely will shift the focus of development into the central and western portions of the State. Taking these two factors into consideration, construction of much of the new wind power anticipated in the Governor's 2015 Renewable Energy Challenge likely would occur in the western two-thirds of Kansas. If we assume that even one-half of the estimated 500 turbines are placed in lesser prairie-chicken range, 250 turbines would individually impact over 101,000 ha (250,000 ac), based on an avoidance distance of 1.6 km (1 mi). The habitat loss resulting from the above scenario would further reduce the extent of large, unfragmented parcels and influence connectivity between remaining occupied blocks of habitat, reducing the amount of suitable habitat available to the lesser prairie-chicken. Consequently, siting of wind energy arrays and associated facilities, including electrical transmission lines, appears to be a serious threat to lesser prairie-chickens in western Kansas within the near future (Rodgers 2007a).

In Colorado, the DOE, National Renewable Energy Laboratory (2010b, p. 1) rated the southeastern corner of Colorado as having good wind resources, the largest area of Colorado with that ranking. The area almost completely overlaps the currently occupied range of the lesser prairie-chicken in Colorado. The CPW reported that commercial wind development is occurring in Colorado, but that most of the effort is currently centered north of the occupied range of lesser prairie-chicken in southeastern Colorado.

Wind energy development in New Mexico is a lower priority than in other States within the range of the lesser prairie-chicken. In New Mexico, the suitability for wind energy development in the currently occupied range of the lesser prairie-chicken is only rated as fair (DOE, National Renewable Energy Laboratory 2010b, p. 1). However, some parts of northeastern New Mexico within lesser prairie-chicken historical range have been rated as excellent. Northeastern New Mexico is important to lesser prairie-chicken conservation because this area is vital to efforts to reestablish or reconnect the New Mexico lesser prairie-chicken population to those in Colorado and the Texas panhandle.

In Texas, the Public Utility Commission recently directed the Electric Reliability Council of Texas (ERCOT) to develop transmission plans for wind capacity to accommodate between 10,000 and 25,000 MW of power (American Wind Energy Association 2007b, pp. 2–3). ERCOT is a regional transmission organization with jurisdiction over most of Texas. The remainder of Texas, largely the Texas panhandle, lies within the jurisdiction of the Southwest Power Pool. A recent assessment from ERCOT identified more than 130,000 MW of high-quality wind sites in Texas, more electricity than the entire State currently uses. The establishment of Competitive Renewable Energy Zones by ERCOT within the State of Texas will facilitate wind energy development throughout western Texas. The top four Competitive Renewable Energy Zones, based on the development priority of each zones are located within occupied and historical lesser prairie-chicken habitat in the Texas panhandle. There is a high level of overlap between lesser prairie-chicken currently occupied range in Texas and the Competitive Renewable Energy Zones, which are designated for future wind energy development in the Texas panhandle.

Wind energy and associated transmission line development in the Texas panhandle and portions of west Texas represent a threat to extant lesser prairie-chicken populations in the State. Once established, wind farms and associated transmission features would severely hamper future efforts to restore population connectivity and gene flow (transfer of genetic information from one population to another) between existing populations that are currently separated by incompatible land uses in the Texas panhandle.

Development of high-capacity transmission lines is critical to the development of the anticipated wind energy resources in ensuring that the generated power can be delivered to the consumer. According to ERCOT (American Wind Energy Association 2007a, p. 9), every $1 billion invested in new transmission capacity enables the construction of $6 billion of new wind farms. We estimate, based on a spatial analysis prepared by The Nature Conservancy under their license agreement with Ventyx Energy Corporation, that there are some 35,220 km (21,885 mi) of transmission lines, having a capacity of 69 kilovolts (kV) or larger, in service within the historical range of the lesser prairie-chicken. Within the estimated currently occupied range, this analysis estimated that about 3,610 km (2,243 mi) of transmission lines with a capacity of 69kV and larger are currently in service. Within the currently occupied range, this same analysis revealed that an additional 856 km (532 mi) of 69kV or higher transmission line is anticipated to be in service within the near future.

The Southwest Power Pool has information about several proposed electric transmission line upgrades. This organization identified approximately 423 km (263 mi) of proposed new transmission lines, commonly referred to as the ''X Plan'', that were being evaluated during the transmission planning process. Transmission planning continues to move forward, and numerous alternatives are being evaluated, many of which will connect transmission capacity throughout all or portions of occupied lesser prairie-chicken range and serve to catalyze extensive wind energy development throughout much of the remaining occupied lesser prairie-chicken range in Kansas, Oklahoma, and Texas. Additionally, Clean Line Energy is planning to build a major direct current transmission line that would originate within the western portion of the Oklahoma panhandle, travel the length of the panhandle region, and then drop south to near Woodward, Oklahoma, before continuing eastward across Oklahoma and Arkansas.

A similar direct current transmission line, known as the Grain Belt Express, is planned for Kansas. The line would originate in west-central Kansas and continue to its endpoint in the upper Midwestern United States. Very little opportunity to interconnect with these lines exists due to the anticipated high cost associated with development of an appropriate interconnecting substation. Consequently, most of the anticipated wind power that will be transmitted across the Oklahoma and Kansas projects likely will occur near the western terminals associated with these two lines. Assuming a fairly realistic build-out scenario for these

transmission lines, in which wind power projects would most likely be constructed within 170 km (105 mi) of the western end points of each line, would place most of the estimated occupied range in Colorado, Kansas, Oklahoma, and northeast Texas within the anticipated development zone. Although both of these projects are still relatively early in the planning process, and the specific environmental impacts have yet to be determined, a reasonably likely wind power development scenario would place much of the occupied range at risk of development.

In summary, wind energy and associated infrastructure development is occurring now and is expected to continue into the foreseeable future within occupied portions of lesser prairie-chicken habitat. Proposed transmission line improvements will serve to facilitate further development of additional wind energy resources. Future wind energy developments, based on the known locations of areas with excellent to good wind energy development potential, likely will have substantial overlap with known lesser prairie-chicken populations. There is little published information on the specific effects of wind power development on lesser prairie-chickens. Most published reports on the effects of wind power development on birds focus on the risks of collision with towers or turbine blades. However, we do not expect that significant numbers of collisions with spinning blades would be likely to occur due to avoidance of the wind towers and associated transmission lines by lesser prairie-chickens. The most significant impact of wind energy development on lesser prairie-chickens is caused by the presence of vertical structures (turbine towers and transmission lines) within suitable habitat. Avoidance of these vertical structures by lesser prairie-chickens can be as much as 1.6 km (1 mi), resulting in large areas (814 ha (2,011 ac) for a single turbine) of unsuitable habitat relative to the overall footprint of a single turbine. Where such development has occurred or is likely to occur, these areas are no longer suitable for lesser prairie-chicken even though many of the typical habitat components used by lesser prairie-chicken remain. Therefore, considering the scale of current and future wind development that is likely within the range of the lesser prairie-chicken and the significant avoidance response of the species to these developments, we conclude that wind energy development is a threat to the species, especially when considered in combination with other habitat fragmenting activities.

Roads and Other Similar Linear Features

Similar to transmission lines, roads are a linear feature on the landscape that can contribute to loss and fragmentation of suitable habitat, and can fragment populations as a result of behavioral avoidance. The observed behavioral avoidance associated with roads is likely due to noise, visual disturbance, and increased predator movements paralleling roads. For example, roads are known to contribute to lek abandonment when they disrupt the important habitat features associated with lek sites (Crawford and Bolen 1976b, p. 239). The presence of roads allows human encroachment into habitats used by lesser prairie-chickens, further causing fragmentation of suitable habitat patches. Some mammalian species known to prey on lesser prairie-chickens, such as red fox, raccoons, and striped skunks, have greatly increased their distribution by dispersing along roads (Forman and Alexander 1998, p. 212; Forman 2000, p. 33; Frey and Conover 2006, pp. 1114–1115).

Traffic noise from roads may indirectly impact lesser prairie-chickens. Because lesser prairie-chickens depend on acoustical signals to attract females to leks, noise from roads, oil and gas development, wind turbines, and similar human activity may interfere with mating displays, influencing female attendance at lek sites and causing young males not to be drawn to the leks. Within a relatively short period, leks can become inactive due to a lack of recruitment of new males to the display grounds.

Roads also may influence lesser prairie-chicken dispersal, likely dependent upon the volume of traffic, and thus disturbance, associated with the road. However, roads likely do not constitute a significant barrier to dispersal. Lesser prairie-chickens have been shown to avoid areas of suitable habitat near larger, multiple-lane, paved roads (Pruett *et al.* 2009a, pp. 1256, 1258). Generally, roads were between 4.1 and 5.3 times less likely to occur in areas used by lesser prairie-chickens than areas that were not used and can influence habitat and nest site selection (Hagen *et al.* 2011, pp. 68, 71–72). Lesser prairie-chickens are thought to avoid major roads due to disturbance caused by traffic volume and, perhaps behaviorally, to avoid exposure to predators that may use roads as travel corridors. Similar behavior has been documented in sage grouse (Oyler-McCance *et al.* 2001, p. 330). When factors believed to have contributed to extirpation of sage grouse were examined, Wisdom *et al.* (2011, p. 467) found that extirpated range contained almost 27 times the human density, was 60 percent closer to highways, and had 25 percent higher density of roads, in contrast to occupied range.

Roads also can cause direct mortality due to collisions with automobiles and possibly increased predation. Although individual mortality resulting from collisions with moving vehicles does occur, the mortalities typically are not monitored or recorded. Therefore we cannot determine the importance of direct mortality from roads on lesser prairie-chicken populations.

Using the data layers provided in StreetMap USA, a product of ESRI Corporation and intended for use with ArcGIS, we can estimate the scope of the impact of roads on lesser prairie-chickens. Within the entire historical range, there are 622,061 km (386,581 mi) of roads. This figure includes major Federal and state highways as well as county highways and smaller roads. Within the currently occupied range, some 81,874 km (50,874 mi) of roads have been constructed. While we don't anticipate significant expansion of the number of existing roads, these roads have already contributed to significant habitat fragmentation within the historical and occupied range of the lesser prairie-chicken. This fragmentation in combination with other causes described in this document further reduces the habitat available to support lesser prairie-chicken populations. The resultant fragmentation is detrimental to lesser prairie-chickens because they rely on large, expansive areas of contiguous rangeland and grassland to complete their life cycle.

In summary, roads occur throughout the range of the lesser prairie-chicken and contribute to the threat of cumulative habitat fragmentation to the species.

Petroleum Production

Petroleum production, primarily oil and gas development, is occurring over much of the historical and current range of the lesser prairie-chicken. Oil and gas development involves activities such as surface exploration, exploratory drilling, field development, and facility construction. Ancillary facilities can include compressor stations, pumping stations, and electrical generators. Activities such as well pad construction, seismic surveys, access road development, power line construction, and pipeline corridors can directly impact lesser prairie-chicken

habitat. Indirect impacts from noise, gaseous emissions, and human presence also influence habitat quality in oil and gas development areas. These activities affect lesser prairie-chickens by disrupting reproductive behavior (Hunt and Best 2004, p. 41) and through habitat fragmentation and conversion (Hunt and Best 2004, p. 92). Smith *et al.* (1998, p. 3) observed that almost one-half, 13 of 29, of the abandoned leks examined in southeastern New Mexico in an area of intensive oil and gas development had a moderate to high level of noise. Hunt and Best (2004, p. 92) found that abandoned leks in southeastern New Mexico had more active wells, more total wells, and greater length of access road than active leks. They concluded that petroleum development at intensive levels, with large numbers of wells in close proximity to each other necessitating large road networks and an increase in the number of power lines, is likely not compatible with life-history requirements of lesser prairie-chickens (Hunt and Best 2004, p. 92).

Impacts from oil and gas development and exploration is the primary reason thought to be responsible for the species' near absence throughout previously occupied portions of the Carlsbad BLM unit in southeastern New Mexico (Belinda 2003, p. 3). This is supported by research examining lesser prairie-chicken losses over the past 20 years on Carlsbad BLM lands (Hunt and Best 2004, pp. 114–115). In this study, factor analysis (a statistical method used to describe variability among observed variables in reference to a number of unobserved variables) of characters associated with active and abandoned leks was conducted to determine which potential causes were associated with the population decline. Those variables associated with oil and gas development explained 32 percent of observed lek abandonment (Hunt and Best 2004) and the consequent population extirpation.

Although the Service presently lacks the information to specifically quantify and analyze drilling activity throughout the entire historical and occupied range of the lesser prairie-chicken, known activity within certain areas of the historical range demonstrates the significance of the threat. For example, the amount of habitat fragmentation due to oil and gas extraction in the Texas panhandle and western Oklahoma associated with the Buffalo Wallow oil and gas field within the Granite Wash formation of the Anadarko Basin has steadily increased over time. In 1982, the rules for the Buffalo Wallow field allowed one well per 130 ha (320 ac). In late 2004, the Texas Railroad Commission changed the field rule regulations for the Buffalo Wallow oil and gas field to allow oil and gas well spacing to a maximum density of one well per 8 ha (20 ac) (Rothkopf *et al.* 2011, p. 1). When fully developed at this density, the region will have experienced a 16-fold increase in habitat fragmentation in comparison with the rates allowed prior to 2004.

In the BLM's Special Status Species Record of Decision and approved Resource Management Plan Amendment (RMPA), some limited protections for the lesser prairie-chicken in New Mexico are provided by reducing the number of drilling locations, decreasing the size of well pads, reducing the number and length of roads, reducing the number of powerlines and pipelines, and implementing best management practices for development and reclamation (BLM 2008, pp. 5–31). The RMPA provides guidance for management of approximately 344,000 ha (850,000 ac) of public land and 121,000 ha (300,000 ac) of Federal minerals in Chaves, Eddy, Lea, and Roosevelt Counties in New Mexico. Implementation of these restrictions, particularly curtailment of new mineral leases, would be concentrated in the Core Management and Primary Population Areas (BLM 2008, pp. 9–11). The Core Management and Primary Population Areas are located in the core of the lesser prairie-chicken occupied range in New Mexico. The effect of these best management practices on the status of the lesser prairie-chicken is unknown, particularly considering about 60,000 ha (149,000 ac) have already been leased in those areas (BLM 2008, p. 8). The plan stipulates that measures designed to protect the lesser prairie-chicken and dunes sagebrush lizard may not allow approval of all spacing unit locations or full development of the lease (BLM 2008, p. 8).

Oil and gas development and exploration is ongoing in the remaining States although the precise extent is currently unknown. Some development is anticipated in Baca County, Colorado, although the timeframe for initiation of those activities is uncertain (CPW 2007, p. 2). In Oklahoma, oil and gas exploration statewide continues at a high level. Since 2002, the average number of active drilling rigs in Oklahoma has steadily risen (Boyd 2009, p. 1). Since 2004, the number of active drilling rigs has remained above 150, reflecting the highest level of sustained activity since the 'boom' years from the late 1970s through the mid-1980s in Oklahoma (Boyd 2007, p. 1).

Wastewater pits associated with energy development are not anticipated to be a major threat to lesser prairie-chickens primarily due to the presence of infrastructure and the lack of suitable cover near these pits. In formations with high levels of hydrogen sulfide gas, the presence of this gas can cause mortality.

In summary, infrastructure associated with current petroleum production contributes to the current threat of habitat fragmentation to the lesser prairie-chicken. Reliable information about future trends for petroleum production is not known for the entire range of the species; however, information for portions of Oklahoma, New Mexico, and Texas indicate petroleum production is a significant threat to the species into the foreseeable future.

Predation

Lesser prairie-chickens have coevolved with a variety of predators, but none are lesser prairie-chicken specialists. Prairie falcon (*Falco mexicanus*), northern harrier (*Circus cyaneus*), Cooper's hawk (*Accipiter cooperii*), great-horned owl (*Bubo virginianus*), other unspecified birds of prey (raptors), and coyote (*Canis latrans*) have been identified as predators of lesser prairie-chicken adults and chicks (Davis *et al.* 1979, pp. 84–85; Merchant 1982, p. 49; Haukos and Broda 1989, pp. 182–183; Giesen 1994a, p. 96). Predators of nests and eggs also include Chihuahuan raven (*Corvus cryptoleucus*), striped skunk (*Mephitis mephitis*), ground squirrels (*Spermophilus* spp.), and bullsnakes (*Pituophis melanoleucus*), as well as coyotes and badgers (*Taxidea taxus*) (Davis *et al.* 1979, p. 51; Haukos 1988, p. 9; Giesen 1998, p. 8).

Lesser prairie-chicken predation varies in both form and frequency throughout the year. In Kansas, Hagen *et al.* (2007, p. 522) attributed some 59 percent of the observed mortality of female lesser prairie-chickens to mammalian predators and between 11 and 15 percent, depending on season, to raptors. Coyotes were reported to be responsible for some 64 percent of the nest depredations observed in Kansas (Pitman *et al.* 2006a, p. 27). Observed mortality of male and female lesser prairie-chickens associated with raptor predation reached 53 percent in Oklahoma and 56 percent in New Mexico (Wolfe *et al.* 2007, p. 100). Predation by mammals was reported to be 47 percent in Oklahoma and 44 percent in New Mexico (Wolfe *et al.* 2007, p. 100). In Texas, over the course of three nonbreeding seasons, Boal and Pirius (2012, p. 8) assessed cause-

specific mortality for 13 lesser prairie-chickens. Avian predation was identified as the cause of death in 10 of those individuals, and mammalian predation was responsible for 2 deaths. The cause of death could not be identified in one of those individuals. Behney *et al.* (2012, p. 294) suspected that mammalian and reptilian predators had a greater influence on lesser prairie-chicken mortality during the breeding season than raptors.

Predation is a naturally occurring phenomenon and generally does not pose a risk to wildlife populations unless the populations are extremely small or have an abnormal level of vulnerability to predation. The lesser prairie-chicken's cryptic plumage and behavioral adaptations allow the species to persist under normal predation pressures. Birds may be most susceptible to predation while on the lek when birds are more conspicuous. Both Patten *et al.* (2005b, p. 240) and Wolfe *et al.* (2007, p. 100) reported that raptor predation increased coincident with lek attendance. Patten *et al.* (2005b, p. 240) stated that male lesser prairie-chickens are more vulnerable to predation when exposed during lek displays than they are at other times of the year and that male lesser prairie-chicken mortality was chiefly associated with predation. However, during 650 hours of lek observations in Texas, raptor predation at leks was considered to be uncommon and an unlikely factor responsible for declines in lesser prairie-chicken populations (Behney *et al.* 2011, pp. 336–337). But Behney *et al.* (2012, p. 294) observed that the timing of lekking activities in their study area corresponded with the lowest observed densities of raptors and that lesser prairie-chickens contend with a more abundant and diverse assemblage of raptors in other seasons.

Predation and related disturbance of mating activities by predators may impact reproduction in lesser prairie-chickens. For females, predation during the nesting season likely would have the most significant impact on lesser prairie-chicken populations, particularly if that predation resulted in total loss of a particular brood. Predation on lesser prairie-chicken may be especially significant relative to nest success. Nest success and brood survival of greater prairie-chickens accounted for most of the variation in population finite rate of increase (Wisdom and Mills 1997, p. 308). Bergerud (1988, pp. 646, 681, 685) concluded that population changes in many grouse species are driven by changes in breeding success. An analysis of Attwater's prairie-chicken supported this conclusion (Peterson and Silvy 1994, p. 227). Recent demographic research on lesser prairie-chicken in southwestern Kansas confirmed that changes in nest success and chick survival, two factors closely associated with vegetation structure, have the largest impact on population growth rates and viability (Hagen *et al.* 2009, p. 1329).

Rates of predation on lesser prairie-chicken likely are influenced by certain aspects of habitat quality such as fragmentation or other forms of habitat degradation (Robb and Schroeder 2005, p. 36). As habitat fragmentation increases, suitable habitats become more spatially restricted and the effects of terrestrial nest predators on grouse populations may increase (Braun *et al.* 1978, p. 316). Nest predators typically have a positive response (*e.g.,* increased abundance, increased activity, and increased species richness) to fragmentation, although the effects are expressed primarily at the landscape scale (Stephens *et al.* 2003, p. 4). Similarly, as habitat quality decreases through reduction in vegetative cover due to grazing or herbicide application, predation of lesser prairie-chicken nests, juveniles, and adults are all expected to increase. For this reason, ensuring adequate shrub cover and removing raptor perches such as trees, power poles, and fence posts may lower predation more than any conventional predator removal methods (Wolfe *et al.* 2007, p. 101). As discussed at several locations within this document, existing and foreseeable development of transmission lines, fences, and vertical structures will either contribute to additional predation on lesser prairie-chickens or cause areas of suitable habitat to be abandoned due to behavior avoidance by lesser prairie-chickens. Increases in the encroachment of trees into the native prairies also will contribute to increased incidence of predation by providing additional perches for avian predators. Because predation has a strong relationship with certain anthropogenic factors, such as fragmentation, vertical structures, and roads, continued development is likely to increase the effects of predation on lesser prairie-chickens beyond natural levels. As a result, predation is likely to contribute to the declining status of the species.

Disease

Giesen (1998, p. 10) provided no information on ectoparasites or infectious diseases in lesser prairie-chicken, although several endoparasites, including nematodes and cestodes, are known to infect the species. In Oklahoma, Emerson (1951, p. 195) documented the presence of the external parasites (biting lice-Order Mallophaga) *Goniodes cupido* and *Lagopoecus* sp. in an undisclosed number of lesser prairie-chickens. Between 1997 and 1999, Robel *et al.* (2003, p. 342) conducted a study of helminth parasites in lesser prairie-chicken from southwestern Kansas. Of the carcasses examined, 95 percent had eye worm (*Oxyspirura petrowi*), 92 percent had stomach worm (*Tetrameres* sp.), and 59 percent had cecal worm (*Subulura* sp.) (Robel *et al.* 2003, p. 341). No adverse impacts to the lesser prairie-chicken population they studied were evident as a result of the observed parasite burden. Addison and Anderson (1969, p. 1223) also found eyeworm (*O. petrowi*) from a limited sample of lesser prairie-chickens in Oklahoma. The eyeworm also has been reported from lesser prairie-chickens in Texas (Pence and Sell 1979, p. 145). Pence and Sell (1979, p. 145) also observed the roundworm *Heterakis isolonche* and the tapeworm *Rhabdometra odiosa* from lesser prairie-chickens in Texas. Smith *et al.* (2003, p. 347) reported on the occurrence of blood and fecal parasites in lesser prairie-chickens in eastern New Mexico. Eight percent of the examined birds were infected with *Eimeria tympanuchi,* an intestinal parasite, and 13 percent were infected with *Plasmodium pedioecetii,* a hematozoan. Stabler (1978, p. 1126) first reported *Plasmodium pedioecetii* in the lesser prairie-chicken from samples collected from New Mexico and Texas. In the spring of 1997, a sample of 12 lesser prairie-chickens from Hemphill County, Texas, were tested for the presence of disease and parasites. No evidence of viral or bacterial diseases, hemoparasites, parasitic helminths, or ectoparasites was found (Hughes 1997, p. 2).

Peterson *et al.* (2002, p. 835) reported on an examination of 24 lesser prairie-chickens from Hemphill County, Texas, for several disease agents. Lesser prairie-chickens were seropositive for both the Massachusetts and Arkansas serotypes of avian infectious bronchitis, a type of coronavirus. All other tests were negative.

Reticuloendotheliosis is a viral disease documented from poultry, which has been found to cause serious mortality in captive Attwater's prairie-chickens and greater prairie-chickens. Researchers surveyed blood samples from 184 lesser prairie-chickens from three States during 1999 and 2000, for the presence of reticuloendotheliosis. All samples were negative, suggesting that reticuloendotheliosis may not be a

serious problem for most wild populations of lesser prairie-chicken (Wiedenfeld *et al.* 2002, p. 143).

The impact of West Nile virus on lesser prairie-chickens is unknown. Recently scientists at Texas Tech University detected West Nile virus in a small percentage (1.3 percent) of the lesser prairie-chicken blood samples they analyzed. Other grouse, such as ruffed grouse (*Bonasa umbellus*), have been documented to harbor West Nile virus infection rates similar to some corvids (crows, jays, and ravens). For 130 ruffed grouse tested in 2000, all distant from known West Nile virus epicenters, 21 percent tested positive. This was remarkably similar to American crows (*Corvus brachyrhynchos*) and blue jays (*Cyanocitta cristata*) (23 percent for each species), species with known susceptibility to West Nile virus (Bernard *et al.* 2001, p. 681). Recent analysis of the degree of threat to prairie grouse from parasites and infectious disease concluded that microparasitic infections that cause high mortality across a broad range of galliform (wildfowl species such as turkeys, grouse, and chickens) hosts have the potential to extirpate small, isolated prairie grouse populations (Peterson 2004, p. 35).

Nonparasitic diseases caused by mycotoxins, as well as pesticides and other toxic compounds, also have the potential to influence population dynamics. However, the incidence of disease or parasite infestations in regulating populations of the lesser prairie-chicken is unknown. The Lesser Prairie-Chicken Interstate Working Group (Mote *et al.* 1999, p. 12) concluded that, while density-dependent transmission of disease was unlikely to have a significant effect on lesser prairie-chicken populations, a disease that was transmitted independently of density could have drastic effects. Further research is needed to establish whether parasites regulate prairie grouse populations. Peterson (2004, p. 35) urged natural resource decisionmakers to be aware that macro- and micro-parasites cannot be safely ignored as populations of species such as the lesser prairie-chicken become smaller, more fragmented, and increasingly vulnerable to the effects of disease. Some degree of impact of parasites and disease is a naturally occurring phenomenon for most species and one element of compensatory mortality that occurs among many species. There is no information that indicates parasites or disease are causing, or contributing to, the decline of any lesser prairie-chicken populations, and, at this time, we have no basis for concluding that disease or parasite loads are a threat to any lesser prairie-chicken populations. Consequently, we do not consider disease or parasite infections to be a significant factor in the decline of the lesser prairie-chicken. However, if populations continue to decline or become more fragmented, even small changes in habitat abundance or quality could have more significant consequences.

Hunting and Other Forms of Recreational, Educational, or Scientific Use

In the late 19th century, lesser prairie-chickens were subject to market hunting (Jackson and DeArment 1963, p. 733; Fleharty 1995, pp. 38–45; Jensen *et al.* 2000, p. 170). Harvest has been regulated since approximately the turn of the 20th century (Crawford 1980, pp. 3–4). Currently, the lesser prairie-chicken is classified as a game species in Kansas, New Mexico, Oklahoma, and Texas, although authorized harvest is allowed only in Kansas. In March of 2009, Texas adopted a temporary, indefinite suspension of their current 2-day season until lesser prairie-chicken populations recover to huntable levels. Previously in Texas, lesser prairie-chicken harvest was not allowed except on properties with an approved wildlife management plan specifically addressing the lesser prairie-chicken. When both Kansas and Texas allowed lesser prairie-chicken harvest, the total annual harvest for both States was fewer than 1,000 birds annually.

In Kansas, the current bag limit is one bird daily for lesser prairie-chickens located south of Interstate 70 and two birds for lesser prairie-chickens located north of Interstate 70. The season typically begins in early November and runs through the end of December in southwestern Kansas. In the northwestern portion of the State, the season typically extends through the end of January. During the 2006 season, hunters in Kansas expended 2,020 hunter-days and harvested approximately 340 lesser prairie-chickens. In 2010, 2,863 hunter-days were expended and an estimated 633 lesser prairie-chickens were harvested in Kansas (Pitman 2012a). Given the low number of lesser prairie-chickens harvested per year in Kansas relative to the population size, the statewide harvest is probably insignificant at the population level. There are no recent records of unauthorized harvest of lesser prairie-chickens in Kansas (Pitman 2012b).

Two primary hypotheses exist regarding the influence of hunting on harvested populations—hunting mortality is either additive to other sources of mortality or nonhunting mortality compensates for hunting mortality, up to some threshold level. The compensatory hypothesis essentially implies that harvest by hunting removes only surplus individuals, and individuals that escape hunting mortality will have a higher survival rate until the next reproductive season. Both Hunt and Best (2004, p. 93) and Giesen (1998, p. 11) do not believe hunting has an additive mortality on lesser prairie-chickens, although, in the past, hunting during periods of low population cycles may have accelerated declines (Taylor and Guthery 1980b, p. 2). However, because most remaining lesser prairie-chicken populations are now very small and isolated, and because they naturally exhibit a clumped distribution on the landscape, they are likely vulnerable to local extirpations through many mechanisms, including harvest by humans. Braun *et al.* (1994, p. 435) called for definitive experiments that evaluate the extent to which hunting is additive at different harvest rates and in different patch sizes. They suggested conservative harvest regimes for small or fragmented grouse populations because fragmentation likely decreases the resilience of populations to harvest. Sufficient information to determine the rate of localized harvest pressure is unavailable and, therefore, the Service cannot determine whether such harvest contributes to local population declines. We do not consider hunting to be a threat to the species at this time. However, as populations become smaller and more isolated by habitat fragmentation, their resiliency to the influence of hunting pressure will decline, likely increasing the degree of threat that hunting may pose to the species.

An additional activity that has the potential to negatively affect individual breeding aggregations of lesser prairie-chickens is the growing occurrence of public and guided bird watching tours of leks during the breeding season. The site-specific impact of recreational observations of lesser prairie-chicken at leks is currently unknown but daily human disturbance could reduce mating activities, possibly leading to a reduction in total production. However, disturbance effects are likely to be minimal at the population level if disturbance is avoided by observers remaining in vehicles or blinds until lesser prairie-chickens naturally

disperse from the lek and observations are confined to a limited number of days and leks. Solitary leks comprising fewer than ten males are most likely to be affected by repeated recreational disturbance. Suminski (1977, p. 70) strongly encouraged avoidance of activities that could disrupt nesting activities. Research is needed to quantify this potential threat to local populations of lesser prairie-chickens.

In summary, it is possible that harvest of lesser prairie-chickens through sport hunting might be contributing to a decline of some populations, but we have no information that shows whether this is actually occurring and no basis on which to estimate whether hunting is contributing to decline in some areas. However, as populations continue to decline and become more fragmented, the influence of sport harvest likely will increase the degree of threat. Public viewing of leks tends to be limited, primarily due to a general lack of public knowledge of lek locations and difficulty accessing leks located on private lands. We expect the States will continue to conduct annual lek counts, which contributes to a temporary disturbance when the birds are flushed during attempts to count birds attending the leks. However these disturbances are intermittent and do not occur repeatedly throughout the lekking period. Research on lesser prairie-chickens may result in some capture and handling of the species. Capture-induced stress may occur and could lead to isolated instances of mortality or injury to individual birds. But such research is not widespread and likely does not cause significant population-level impacts. Research is not anticipated to result in loss of habitat, leading to impacts from habitat fragmentation. We are not aware of any other forms of utilization that are negatively impacting lesser prairie-chicken populations. There is currently no known, imminent threat of take attributed to collection or illegal harvest for this species. Consequently, we conclude that overutilization at current population and harvest levels does not pose a threat to the species.

Other Factors

A number of other factors, although they do not directly contribute to habitat loss or fragmentation, can influence the survival of the lesser prairie-chicken. These factors, in combination with habitat loss and fragmentation, likely influence the persistence of the species.

Nest Parasitism and Competition by Exotic Species

Ring-necked pheasants (*Phasianus colchicus*) are nonnative species that overlap the occupied range of the lesser prairie-chicken in Kansas and portions of Colorado, Oklahoma, Texas (Johnsgard 1979, p. 121), and New Mexico (Allen 1950, p. 106). Hen pheasants have been documented to lay eggs in the nests of several bird species, including lesser prairie-chicken and greater prairie-chicken (Hagen *et al.* 2002, pp. 522–524; Vance and Westemeier 1979, p. 223; Kimmel 1987, p. 257; Westemeier *et al.* 1989, pp. 640–641; Westemeier *et al.* 1998, 857–858). Consequences of nest parasitism vary, and may include abandonment of the host nest, reduction in number of host eggs, lower hatching success, and parasitic broods (Kimmel 1987, p. 255). Because pheasant eggs hatch in about 23 days, the potential exists for lesser prairie-chicken hens to cease incubation, begin brooding, and abandon the nest soon after the first pheasant egg hatches. Nests of greater prairie-chickens parasitized by pheasants have been shown to have lower egg success and higher abandonment than unparasitized nests, suggesting that recruitment and abundance may be impacted (Westemeier *et al.* 1998, pp. 860–861). Predation rates also may increase with incidence of nest parasitism (Vance and Westemeier 1979, p. 224). Further consequences are hypothesized to include the imprinting of the pheasant young from the parasitized nest to the host species, and later attempts by male pheasants to court females of the host species (Kimmel 1987, pp. 256–257). Male pheasants have been observed disrupting the breeding behavior of greater prairie-chickens on leks (Sharp 1957, pp. 242–243; Follen 1966, pp. 16–17; Vance and Westemeier 1979, p. 222). In addition, pheasant displays toward female prairie-chickens almost always cause the female to leave the lek (Vance and Westemeier 1979, p. 222). Thus, an attempt by a male pheasant to display on a prairie-chicken lek could disrupt the normal courtship activities of prairie-chickens.

Few published accounts of lesser prairie-chicken nest parasitism by pheasants exist (Hagen *et al.* 2002, pp. 522–524), although biologists from KPWD, ODWC, Sutton Center, TPWD, and the Oklahoma Cooperative Fish and Wildlife Research Unit have given more than 10 unpublished accounts of such occurrences. Westemeier *et al.* (1998, p. 858) documented statistically that for a small, isolated population of greater prairie-chickens in Illinois, nest parasitism by pheasants significantly reduced the hatchability of nests. Based on their findings, they submit that, in areas with high pheasant populations, the survival of isolated, remnant flocks of prairie-chicken may be enhanced by management intervention to reduce nest parasitism by pheasants (Westemeier *et al.* 1998, p. 861). While Hagen *et al.* (2002, p. 523) documented a rate of only 4 percent parasitism (3 of 75 nests) of lesser prairie-chicken nests in Kansas, the sample size was small and may not reflect actual impacts across larger time, geographic, and precipitation scales. Competition with and parasitism by pheasants may be a potential factor that could negatively affect vulnerable lesser prairie-chicken populations at the local level, particularly if remaining native rangelands become increasingly fragmented (Hagen *et al.* 2002, p. 524). More research is needed to understand and quantify impacts of pheasants on lesser prairie-chicken populations range wide.

Hybridization

The sympatric (overlapping) occupation of habitat and leks by greater prairie-chickens and lesser prairie-chickens in portions of central and northwestern Kansas may pose a limited but potential threat to the species in that region. Hybridization could lead to introgression (infiltration of the genes of one species into the gene pool of another through repeated backcrossing) and reduced reproductive potential; however, hybridization has not been confirmed in these two species (Bain and Farley 2002, pp. 684, 686). Historical records document that the species' ranges overlapped, but that habitat partitioning was clearly evident based on the abundance of sand-adapted vegetation. The relative frequency of natural hybridization prior to EuroAmerican settlement is unknown. Currently, the incidence of hybridization between greater prairie-chickens and lesser prairie-chickens appears very low, typically less than 1 percent. The occurrence of hybridization also is restricted to a small portion, about 250,000 ha (617,000 ac), of the overall current range (Bain and Farley 2002, p. 684). Because current populations north of the Arkansas River in Kansas are generally characterized as low density and very dependent upon the residual habitat structure of fragmented tracts of CRP lands, those populations may be ephemeral depending on implementation of CRP projects and stochastic environmental factors. Low population density also may increase

the susceptibility of lesser prairie-chickens to hybridization and exacerbate the potentially negative effects of hybridization. To date, the fertility of hybrid individuals throughout subsequent generations has not been rigorously tested. The immediate and long-term influence of hybridization on the species is unknown and warrants investigation.

Reduced Population Size and Lek Mating System

A number of harmful effects, such as reduced reproductive success and loss of genetic variation and diversity, become more evident as population sizes decline. These effects may be exacerbated by the lek mating system characteristic of many prairie grouse species. Factors such as high visibility, good auditory projection, and lack of ambient noise are known to influence selection of lek sites by prairie chickens, and such factors likely assist females in locating the mating grounds (Gregory *et al.* 2011, p. 29). Johnsgard (2002, p. 129) stressed that the mating system used by prairie grouse works most effectively when populations are dense enough to provide the visual and acoustic stimuli necessary to attract prebreeding females to the lek. Once established, the lek must then be large enough to assure that the matings will be performed by the most physically and genetically fit males. Lek breeding already tends to promote inbreeding owing to the limitations caused by relatively few males siring offspring. The tendency of female lesser prairie-chicken and other prairie grouse to typically nest near a lek other than the one on which they mated is an innate mechanism that can help reduce the effects of inbreeding. The remaining small and fragmented lesser prairie-chicken populations which exist over portions of the currently occupied range indicate that such harmful effects may already be, or soon will be, occurring.

Anthropogenic habitat deterioration and fragmentation not only leads to range contractions and population extinctions but also may also have significant genetic and, thus, evolutionary consequences for the surviving populations. As populations contract and distances between populations increase, opportunities for gene flow are reduced. Specifically, Pruett *et al.* (2009b, p. 258) discussed the influence of population connectivity, or lack thereof, on the lesser prairie-chicken. They concluded that lesser prairie-chicken populations were connected historically, as evidenced by the lack of geographic variation in morphology and the available genetic information which suggests that the populations were contiguous and gene flow occurred among the extant populations. However, Johnson (2008, p. 171) reported that his results indicate that gene flow is currently restricted between lesser prairie-chicken populations in New Mexico and Oklahoma. These findings are not unexpected given information on lesser prairie-chicken movements. Pruett *et al.* (2009b, p. 258) report findings by the Sutton Center that lesser prairie-chickens in Oklahoma were observed to move as much as 20 to 30 km (12 to 19 mi), but the extant lesser prairie-chicken populations in New Mexico and Oklahoma are separated by more than 200 km (124 mi). Given the limited movements of individual lesser prairie-chickens and the distance between these two populations, Pruett *et al.* (2009b, p. 258) considered interaction between these populations to be highly unlikely. Johnson (2008, p. 171) speculated that the observed estimate of gene flow between the New Mexico and Oklahoma populations could be due to effects of recent genetic drift (change in the genetic composition of a population due to chance events) as habitat fragmentation and isolation developed between the New Mexico and Oklahoma populations. Further examination of the viability of existing lesser prairie-chicken populations will be needed to thoroughly describe the effects of small population size and isolation on persistence of the lesser prairie-chicken.

Surface Water Impoundments

Dams have been constructed on streams within the range of the lesser prairie-chicken to produce impoundments for flood control, water supply, and other purposes. The impounded waters flood not only affected stream segments and riparian areas, but also adjacent areas of grassland and shrubland habitats. Although lesser prairie-chickens may make use of free-standing water, as is retained in surface impoundments, its availability is not critical for survival of the birds (Giesen 1998, p. 4).

The historical range of the lesser prairie-chicken contains approximately 25 large impoundments with a surface area greater than 1,618 ha (4,000 ac), the largest 20 of these (and their normal surface acreage) are listed from largest to smallest in Table 3, below.

TABLE 3—IMPOUNDMENTS WITH SURFACE ACREAGE GREATER THAN 1,618 HA (4,000 AC) WITHIN THE HISTORICAL RANGE OF THE LESSER PRAIRIE-CHICKEN

Impoundment	Surface acreage	State
John Martin Reservoir	8,302 ha (20,515 ac)	Colorado.
O. H. Ivie Lake	7,749 ha (19,149 ac)	Texas.
Lake Meredith	6,641 ha (16,411 ac)	Texas.
Lake Kemp	6,309 ha (15,590 ac)	Texas.
Lake Arrowhead	6,057 ha (14,969 ac)	Texas.
E. V. Spence Reservoir	6,050 ha (14,950 ac)	Texas.
Hubbard Creek Reservoir	6,038 ha (14,922 ac)	Texas.
Twin Buttes Reservoir	3,965 ha (9,800 ac)	Texas.
Cheney Reservoir	3,859 ha (9,537 ac)	Kansas.
Wilson Lake	3,642 ha (9,000 ac)	Kansas.
Foss Lake	3,561 ha (8,800 ac)	Oklahoma.
Great Salt Plains Lake	3,516 ha (8,690 ac)	Oklahoma.
Ute Reservoir	3,318 ha (8,200 ac)	New Mexico.
Canton Lake	3,201 ha (7,910 ac)	Oklahoma.
J. B. Thomas Reservoir	2,947 ha (7,282 ac)	Texas.
Cedar Bluff Reservoir	2,779 ha (6,869 ac)	Kansas.
Lake Brownwood	2,626 ha (6,490 ac)	Texas.
Tom Steed Lake	2,590 ha (6,400 ac)	Oklahoma.
Lake Altus-Lugert	2,533 ha (6,260 ac)	Oklahoma.

TABLE 3—IMPOUNDMENTS WITH SURFACE ACREAGE GREATER THAN 1,618 HA (4,000 AC) WITHIN THE HISTORICAL RANGE OF THE LESSER PRAIRIE-CHICKEN—Continued

Impoundment	Surface acreage	State
Lake Kickapoo	2,439 ha (6,028 ac)	Texas.
Total	88,129 ha (217,772 ac)	

(Sources: Kansas Water Office 2012, New Mexico State Parks 2012, Texas Parks and Wildlife Department 2012, Texas State Historical Association 2012, U.S. Army Corps of Engineers 2012, U.S. Bureau of Reclamation 2012)

In addition, the historical range of the lesser prairie-chicken contains many smaller impoundments, such as municipal reservoirs and upstream flood control projects. For example, beginning in the mid-1900s, the USDA constructed hundreds of small impoundments (floodwater retarding structures) within the historical range of the lesser prairie-chicken, through the Watershed Protection and Flood Prevention Program. The program was implemented to its greatest extent in Oklahoma (Oklahoma Conservation Commission 2005), and, within the portion of the lesser prairie-chicken's historical range in that State, the USDA constructed 574 floodwater retarding structures, totaling 6,070 ha (15,001 ac) (Elsener 2012). Similarly, within the portion of the lesser prairie-chicken's historical range in Texas, the USDA constructed 276 floodwater retarding structures, totaling 8,293 surface acres (Bednarz 2012). In Kansas, considerably fewer floodwater retarding structures were constructed within the historical range, totaling some 857 ha (2,118 ac) (Gross 2012). Even fewer such structures were constructed in Colorado and New Mexico.

Cumulatively, the total area of historical lesser prairie-chicken range lost due to construction of large, medium, and small impoundments is about 98,413 ha (243,184 ac), yet likely less than the amount of habitat lost or degraded by other factors discussed in this proposed rule (*e.g.,* conversion of rangeland to cropland and overgrazing). The Service expects a large majority of existing reservoirs to be maintained over the long term. Therefore, these structures will continue to displace former areas of lesser prairie-chicken habitat, as well as fragment surrounding lands as habitat for the lesser prairie-chicken. However, because extensive new dam construction is not anticipated within the lesser prairie-chicken's range, the Service considers it unlikely that this threat will increase in the future.

In summary, several other natural or manmade factors are affecting the continued existence of the lesser prairie-chicken. Parasitism of lesser prairie-chicken nests by pheasants and hybridization with greater prairie chickens has been documented but the incidence remains low. The influence of the above factors on lesser prairie-chicken survival is expected to remain low unless populations continue to decline. Low population density can increase the susceptibility of lesser prairie-chicken to possible genetic effects and increase the negative effects of hybridization, nest parasitism, and competition. The effects of certain natural and manmade factors are considered a threat to the lesser prairie-chicken.

Effects of Existing Regulatory Mechanisms

Regulatory mechanisms, such as Federal, state, and local land use regulation or laws, may provide protection from some threats provided those regulations and laws are not discretionary and are enforceable.

In 1973, the lesser prairie-chicken was listed as a threatened species in Colorado under the State's Nongame and Endangered or Threatened Species Conservation Act. While this designation prohibits unauthorized take, possession, and transport, no protections are provided for destruction or alteration of lesser prairie-chicken habitat. In the remaining States, the lesser prairie-chicken is classified as a game species, although the legal harvest is now closed in New Mexico, Oklahoma, and Texas. Accordingly, the State conservation agencies have the authority to regulate possession of the lesser prairie-chicken, set hunting seasons, and issue citations for poaching. For example, Texas Statute prohibits the destruction of nests or eggs of game birds such as the lesser prairie-chicken. These authorities provide lesser prairie-chickens with protection from direct mortality caused by hunting and prohibit some forms of unauthorized take.

In July of 1997, the NMDGF received a formal request to commence an investigation into the status of the lesser prairie-chicken within New Mexico. This request began the process for potential listing of the lesser prairie-chicken under New Mexico's Wildlife Conservation Act. In 1999, the recommendation to list the lesser prairie-chicken as a threatened species under the Wildlife Conservation Act was withdrawn until more information was collected from landowners, lessees, and land resource managers who may be affected by the listing or who may have information pertinent to the investigation. In late 2006, NMDGF determined that the lesser prairie-chicken would not be State-listed in New Mexico. New Mexico's Wildlife Conservation Act, under which the lesser prairie-chicken could have been listed, offers little opportunity to prevent otherwise lawful activities, including many of the activities previously discussed.

Regardless of each State's listing status, most occupied lesser prairie-chicken habitat throughout its current range occurs on private land (Taylor and Guthery 1980b, p. 6), where State conservation agencies have little authority to protect or direct management of the species' habitat. All five States in occupied range have incorporated the lesser prairie-chicken as a species of conservation concern and management priority in their respective State Wildlife Action Plans. While identification of the lesser prairie-chicken as a species of conservation concern does help heighten public awareness, this designation provides no protection from direct take or habitat destruction or alteration.

Some States, such as Oklahoma, have laws and regulations that address use of State school lands, primarily based on maximizing financial return from operation of these lands. However, the scattered nature of these lands and requirement to maximize financial returns minimize the likelihood that these lands will be managed to reduce degradation and fragmentation of habitat and ensure the conservation of the species.

Lesser prairie-chickens are not covered or managed under the provisions of the Migratory Bird Treaty Act (16 U.S.C. 703–712) because they are considered resident game species. The lesser prairie-chicken has an

International Union for Conservation of Nature (IUCN) Red List Category of ''vulnerable'' (BirdLife International 2008), and NatureServe currently ranks the lesser prairie-chicken as G3—Vulnerable (NatureServe 2011, entire). The lesser prairie-chicken also is on the National Audubon Society's WatchList 2007 Red Category, which is ''for species that are declining rapidly or have very small populations or limited ranges, and face major conservation threats.'' However, none of these designations provide any regulatory protection.

There are six National Grasslands located within the historical range of the lesser prairie-chicken. The National Grasslands are managed by the USFS, have been under Federal ownership since the late 1930s, and were officially designated as National Grasslands in 1960. The Kiowa, Rita Blanca, Black Kettle, and McClellan Creek National Grasslands are administered by the Cibola National Forest. The Kiowa National Grassland covers 55,659 ha (137,537 ac) and is located within Mora, Harding, Union, and Colfax Counties, New Mexico. The Rita Blanca National Grassland covers 37,631 ha (92,989 ac) and is located within Dallam County, Texas, and Cimarron County, Oklahoma. The Black Kettle National Grassland covers 12,661 ha (31,286 ac) and is located within Roger Mills County, Oklahoma, and Hemphill County, Texas. The McClellan Creek National Grassland covers 586 ha (1,449 ac) and is located in Gray County, Texas. No breeding populations of lesser prairie-chickens are known to occur on these holdings.

The Comanche and Cimarron National Grasslands are under the administration of the Pike and San Isabel National Forest. The Comanche National Grassland covers 179,586 ha (443,765 ac) and is located within Baca, Las Animas, and Otero Counties, Colorado. The Cimarron National Grassland covers 43,777 ha (108,175 ac) and is located in Morton and Stevens Counties, Kansas. Both of these areas are known to support breeding lesser prairie-chickens.

The National Forest Management Act of 1976 and the associated planning rule in effect at the time of planning initiation are the principal law and regulation governing the planning and management of National Forests and National Grasslands by the USFS. In 2008, a new National Forest System Land Management Planning Rule (36 CFR Part 219) took effect and was used to guide the development of a Land and Resource Management Plan for the Comanche and Cimarron National Grasslands. That plan was one of the first plans developed and released under the 2008 planning rule. The predecisional review version of the Cimarron and Comanche National Grasslands Land Management Plan was made available to the public on October 17, 2008. The lesser prairie-chicken was included as a species-of-concern in accordance with guidance available in the existing planning rule (USFS 2008, p. 35). As defined in the 2008 planning rule, species-of-concern are species for which the Responsible Official determines that management actions may be necessary to prevent listing under the Endangered Species Act (36 CFR 219.16). Identification of the lesser prairie-chicken as a species-of-concern in the Cimarron and Comanche National Grasslands Land Management Plan led to inclusion of planning objectives targeting improvement of the species' habitat, as described below.

Planning for the Kiowa, Rita Blanca, Black Kettle, and McClellan Creek National Grasslands was well underway when the 2008 National Forest System Land Management Planning Rule was enjoined on June 30, 2009, by the United States District Court for the Northern District of California (*Citizens for Better Forestry* v. *United States Department of Agriculture,* 632 F. Supp. 2d 968 (N.D. Cal. June 30, 2009)). A new planning rule was finalized in 2012 (77 FR 67059) and became effective on May 9, 2012. The transition provisions of the 2012 planning rule (36 CFR 219.17(b)(3)) allow those National Forest System lands that had initiated plan development, plan amendments, or plan revisions prior to May 9, 2012, to continue using the provisions of the prior planning regulation. The Cibola National Forest elected to use the provisions of the 1982 planning rule, including the requirement to prepare an Environmental Impact Statement, to complete its plan development for the Kiowa, Rita Blanca, Black Kettle, and McClellan Creek National Grasslands.

The Comanche and Cimarron National Grasslands currently manages the Comanche Lesser Prairie-chicken Habitat Zoological Area, now designated as a Colorado Natural Area, which encompasses an area of 4,118 ha (10,177 ac) that is managed to benefit the lesser prairie-chicken. Current conditions on this area include existing oil and gas leases, two-track roads, utility corridors, and livestock grazing. Wildfires on the area have been suppressed over the last 30 years. The area provides a special viewing area for the lesser prairie-chicken, which has been closed to protect lekking activities. The plan specifies that the desired future condition of the area would be to retain habitat conditions suitable for the lesser prairie-chicken. Specifically, the objectives of the plan identify steps that would be taken over the next 15 years to achieve the desired conditions. One objective would be to retain a minimum of 6,665 ha (16,470 ac) of sand sagebrush prairie ecosystem for the lesser prairie-chicken. Within the Comanche Lesser Prairie-chicken Habitat Zoological Area, over the next 15 years, a minimum of 202 ha (500 ac) would be treated to increase native plant diversity.

Design criteria identified in the current Cimarron and Comanche National Grasslands Land Management Plan for management of the sand sagebrush prairie include: (1) Limited construction of new structures or facilities typically within 3.2 km (2 mi) of known lesser prairie-chicken leks or populations if those structures and facilities would negatively impact the lesser prairie-chicken; (2) protection of leks, nesting habitat, and brood rearing habitat from surface disturbances (*e.g.,* dog training, drilling, and various forms of construction) between March 15 to July 15; and (3) provision for adequate residual cover during nesting periods. Within the Comanche Lesser Prairie-Chicken Habitat Zoological Area, design criteria include limiting or using livestock grazing in a manner that does not negatively impact lesser prairie-chicken nesting habitat. The USFS also committed to monitoring any changes in distribution and abundance of the lesser prairie-chicken on the National Grasslands.

Prior planning regulations included a requirement for the USFS to identify species as management indicator species, if their population changes were believed to be indicative of the effects of management activities (36 CFR 219.19). Under the 2008 regulations, the concept of management indicator species was not included in the final rule. The 2008 planning regulations instead chose to use ''species-of-concern''. Species that were identified as proposed and candidate species under the Endangered Species Act were classified as species-of-concern. The primary purpose of identifying species-of-concern was to put in place provisions that would have contributed to keeping those species from being listed as threatened or endangered species. As explained above, the transition provisions (36 CFR 219.17(b)(3)) of the 2012 planning rule allow the use of the provisions of the 1982 planning rule, including the requirement that management indicator species be identified as part of the plan.

Management indicator species serve multiple functions in forest planning: Focusing management direction developed in the alternatives, providing a means to analyze effects on biological diversity, and serving as a reliable feedback mechanism during plan implementation. The latter often is accomplished by monitoring population trends in relationship to habitat changes. Although suitable habitat is present, no breeding populations of lesser prairie-chickens are known from the Kiowa, Rita Blanca, Black Kettle, and McClellan Creek National Grasslands. Consequently, the lesser prairie-chicken is not designated as a management indicator species in the plan. Instead the lesser prairie-chicken is included on the Regional Forester's sensitive species list and as an At-Risk species.

The USFS also contracted with lesser prairie-chicken experts to prepare a succinct evaluation of species of potential viability concern, addressing eight factors pertinent to species viability. A Technical Conservation Assessment for the lesser prairie-chicken (Robb and Schroeder 2005, p. 8) was completed and confirms the need to retain sensitive species status designation for the lesser prairie-chicken. Species conservation assessments produced as part of the Species Conservation Project are designed to provide land managers, biologists, and the public with a thorough discussion of the biology, ecology, conservation, and management of the lesser prairie-chicken based on existing scientific knowledge. The assessment goals limit the scope of the work to summaries of scientific knowledge, discussion of broad implications of that knowledge, and outlines of information needs. The assessment does not seek to develop specific prescriptions for management of populations and habitats. Instead, it is intended to provide the ecological background upon which management should be based and focuses on the consequences of changes in the environment that result from management (*i.e.,* management implications). This comprehensive document can be found on the internet at *http://www.fs.fed.us/r2/projects/scp/assessments/lesserprairiechicken.pdf.*

The other primary Federal surface ownership of lands occupied by the lesser prairie-chicken is administered by the BLM in New Mexico. In New Mexico, roughly 41 percent of the known historical and most of the currently occupied lesser prairie-chicken range occurs on BLM land. The BLM currently manages approximately 342,969 surface ha (847,491 ac) within lesser prairie-chicken range in eastern New Mexico. They also oversee another 120,529 ha (297,832 ac) of Federal minerals below private surface ownership. The core of currently occupied lesser prairie-chicken habitat in New Mexico is within the Roswell BLM Resource Area. However, the Carlsbad BLM Resource Area comprised much of the historical southern periphery of the species' range in New Mexico. The BLM's amended RMPA (BLM 2008, pp. 5–31) provides some limited protections for the lesser prairie-chicken in New Mexico by reducing the number of drilling locations, decreasing the size of well pads, reducing the number and length of roads, reducing the number of powerlines and pipelines, and implementing best management practices for development and reclamation. Implementation of these protective measures, particularly curtailment of new mineral leases, would be greatest in the Core Management Area and the Primary Population Area habitat management units (BLM 2008, pp. 9–11). The Core Management and Primary Population Areas are located in the core of the lesser prairie-chicken occupied range in New Mexico. The effect of these best management practices on the status of the lesser prairie-chicken is unknown, particularly considering some 60,000 ha (149,000 ac) have already been leased in those areas (BLM 2008, p. 8). The effectiveness of the amended RMPA is hampered by a lack of explicit measures designed to improve the status of the lesser prairie-chicken, limited certainty that resources will be available to carry out the management plan, limited regulatory or procedural mechanisms in place to carry out the efforts, lack of monitoring efforts, and provision for exceptions to the best management practices under certain conditions, which could negate the benefit of the conservation measures.

The amended RMPA stipulates that implementation of measures designed to protect the lesser prairie-chicken and dunes sagebrush lizard may not allow approval of all spacing unit locations or full development of a lease (BLM 2008, p. 8). In addition, the RMPA prohibits drilling and exploration in lesser prairie-chicken habitat between March 1 and June 15 of each year (BLM 2008, p. 8). No new mineral leases will be issued on approximately 32 percent of Federal mineral acreage within the RMPA planning area (BLM 2008, p. 8), although some exceptions are allowed on a case-by-case basis (BLM 2008, pp. 9–11). Within the Core Management Area and Primary Population Area, new leases will be restricted in occupied and suitable habitat; however, if there is an overall increase in reclaimed to disturbed acres over a 5-year period, new leases in these areas will be allowed (BLM 2008, p. 11). Considering Hunt and Best (2004, p. 92) concluded that petroleum development at intensive levels likely is not compatible with populations of lesser prairie-chicken, additional development in the Core Management Area and Primary Population Area habitat management units may hinder long-term conservation of the species in New Mexico. The RMPA allows lease applicants to voluntarily participate in a power line removal credit to encourage removal of idle power lines (BLM 2008, pp. 2–41). In the southernmost habitat management units, the Sparse and Scattered Population Area and the Isolated Population Area, where lesser prairie-chickens are now far less common than in previous decades (Hunt and Best 2004), new leases will not be allowed within 2.4 km (1.5 mi) of a lek (BLM 2008, p. 11).

The ineffectiveness of certain imposed energy development stipulations near leks for the purpose of protecting grouse on Federal lands has been recently confirmed for sage grouse. Holloran (2005, p. 57) and Naugle *et al.* (2006a, p. 3) documented that sage grouse avoid energy development (coalbed methane) not only in breeding and nesting habitats, but also in wintering habitats. They assert that current best management practices in use by Federal land management agencies that place timing stipulations or limit surface occupancy near greater sage-grouse leks result in a human footprint that far exceeds the tolerance limits of sage grouse. Ultimately, they recommended that effective conservation strategies for grouse must limit the cumulative impact of habitat disturbance, modification, and destruction in all habitats and at all times of the year (Holloran 2005, p. 58; Naugle *et al.* 2006b, p. 12). Additional research on the effect of petroleum development on lesser prairie-chicken is needed. However, available information on the lesser prairie-chicken (Suminski 1977, p. 70; Hagen *et al.* 2004, pp. 74–75; Hunt and Best 2004, p. 92; Pitman *et al.* 2005, pp. 1267–1268) indicates that the effect is often detrimental, particularly during the breeding season.

Because only about 4 percent of the species' overall range occurs on Federal lands, the Service recognizes that the lesser prairie-chicken cannot be fully recovered on Federal lands alone. However, no laws or regulations

currently protect lesser prairie-chicken habitat on private land, aside from State harvest restrictions. Therefore, the Service views decisions regarding the management and leasing of Federal lands and minerals within existing lesser prairie-chicken range as important to the future conservation and persistence of the species.

Since 2004, the construction of commercial wind energy projects near and within occupied lesser prairie-chicken habitat has raised concerns about the potential negative effects such projects may have on the species, if constructed at large scales in occupied range. As discussed previously, a rapid expansion of transmission lines and associated wind energy development throughout large portions of occupied lesser prairie-chicken range is occurring. Because most wind development activities are privately funded and are occurring on private land, wind energy siting, development, and operation falls outside the purview of the National Environmental Policy Act of 1969 (NEPA) and other Federal conservation statues and regulatory processes. As a result, little opportunity for timely and appropriate environmental review and consultation by Federal, state, and local conservation entities exists.

The current lack of regulatory oversight and public notice requirements for the purchase of wind rights and construction of wind generation and related transmission facilities is a concern. Specifically, the Service is unaware of any state or Federal mechanisms that require potential wind energy producers to disclose the location, size, and anticipated construction date for pending projects or require analysis under the provisions of the NEPA. Lacking the ability to obtain pertinent siting information or analyze alternative siting locations, neither the Service nor State conservation agencies have the ability to accurately influence the size or timing of wind generation construction activities within occupied lesser prairie-chicken habitat.

In summary, most occupied lesser prairie-chicken habitat occurs on private land, where State conservation agencies have little authority to protect lesser prairie-chicken or facilitate and monitor management of lesser prairie-chicken habitat beyond regulating recreational harvest. Because most lesser prairie-chicken habitat destruction and modification on private land occurs through otherwise lawful activities such as agricultural conversion, livestock grazing, energy development, and fire exclusion, few (if any) regulatory mechanisms are in place to substantially alter human land uses at a sufficient scale to protect lesser prairie-chicken populations and their habitat. While almost no regulatory protection is in place for the species, regulatory incentives, in the form of county, state, and national legislative actions, have been created to facilitate the expansion of activities that result in fragmentation of occupied lesser prairie-chicken habitat, such as that resulting from oil, gas, and wind energy development. For the remaining 4 percent of occupied habitat currently under Federal management, habitat quality depends primarily on factors related to multiple use mandates, such as livestock grazing and oil, gas, and wind power development activities. Because prior leasing commitments and management decisions on the majority of occupied parcels of Federal land offer little flexibility for reversal, any new regulatory protection for uncommitted land units are important and will take time to achieve substantial benefits for the species in the long term.

We note that the existing regulatory mechanisms at the Federal and State level have not been sufficient to preclude the decline of the species. In spite of the existing regulatory mechanisms, the current and projected threat from the loss and fragmentation of lesser prairie-chicken habitat and range is still ongoing.

Proposed Listing Determination

As required by the Act, we considered the five factors in assessing whether the lesser prairie-chicken meets the definition of a threatened or endangered species. We examined the best scientific and commercial information available regarding the past, present, and future threats faced by the lesser prairie-chicken. Based on our review of the best available scientific and commercial information, we find the lesser prairie-chicken is likely to become in danger of extinction in the foreseeable future and therefore meets the definition of a threatened species.

The life history and ecology of the lesser prairie-chicken makes it exceptionally vulnerable to changes on the landscape. As discussed above, the lek breeding system which requires males and females to be able to hear and see each other over relatively wide distances, the need for large patches of habitat that include several types of microhabitats, and the behavioral avoidance of vertical structures make the lesser prairie-chicken vulnerable to habitat impacts, especially at its currently reduced numbers. Specifically, its behavioral avoidance of vertical structures causes its habitat to be more functionally fragmented than another species' habitat would be. For example, a snake likely would continue to use habitat underneath a wind turbine, but the lesser prairie-chicken's predator avoidance behavior causes it to avoid a large area (estimated to be a mile) around a tall vertical object. The habitat within that 1.6-km (1-mi) buffer continues to be otherwise suitable for lesser prairie-chickens, but the entire area is avoided because of the vertical structure. As a result, the impact of any individual fragmenting feature is of higher magnitude than the physical footprint of that structure would suggest it should be.

The historical, current, and ongoing threats to the lesser prairie-chicken are widespread and of high magnitude. The lesser prairie-chicken is currently imperiled throughout all of its range due to historical, ongoing impacts and probable future impacts of the cumulative habitat loss and fragmentation. These impacts are the result of conversion of grasslands to agricultural uses, encroachment by invasive woody plants, wind energy development, petroleum production, roads, and presence of manmade vertical structures including towers, utility lines, fences, turbines, wells, and buildings. The historical and current impact of these fragmenting factors has reduced the status of the species to the point that individual populations are vulnerable to extirpation as a result of stochastic events such as extreme weather events. Additionally, these populations are more vulnerable to the effects of climate change, disease, and predation than they would have been at historical population levels. These threats are currently impacting lesser prairie-chickens throughout their range and are projected to continue and to increase in severity into the foreseeable future.

The range of the lesser prairie-chicken has been reduced by an estimated 84 percent. The vulnerability of lesser prairie-chickens to changes on the landscape is magnified compared to historical times due to its reduced population numbers, prevalence of isolated populations, and reduced range. There are few areas of large patches of unfragmented, suitable grassland remaining. Based on our analysis presented earlier, some 99.8 percent of the remaining suitable habitat patches were less than 2,023 ha (5,000 ac) in size. In order to thrive and colonize unoccupied areas, lesser prairie-chickens require large patches of functionally unfragmented habitat that include a variety of microhabitats needed to support lekking, nesting,

brood rearing, feeding for young, and feeding for adults, among other things. Habitat patches that do not contain all of these microhabitats may support population persistence, but may not support thriving populations that can produce surplus males capable of colonizing new areas or recolonizing previously extirpated areas.

Due to its reduced population size and ongoing habitat loss and degradation, the species lacks sufficient redundancy and resiliency to recover from present and foreseeable future probable threats. As a result, the status of the species has been reduced to the point that individual populations are vulnerable to extirpation due to a variety of stochastic events (*e.g.,* drought, winter storms). These extirpations are especially significant because, in many places, there are no nearby, connected populations with robust numbers that can rescue the extirpated populations (*i.e.,* be a source for recolonization). Without intervention, population numbers will continue to decline and the range of the species will continue to contract.

In summary, as a result of the significant reduction in numbers and range of lesser prairie-chickens resulting from cumulative ongoing habitat fragmentation, combined with the lack of sufficient redundancy and resiliency of current populations, we conclude that the lesser prairie-chicken is currently at risk of extinction or is likely to be in danger of extinction in the foreseeable future.

We must then assess whether the species is in danger of extinction now (*i.e.,* an endangered species) or is likely to become in danger of extinction in the foreseeable future (*i.e.,* a threatened species). In assessing the status of the lesser prairie-chicken, we applied the general understanding of ''in danger of extinction'' as discussed in the December 22, 2010, memo to the Polar Bear Listing Determination File, ''Supplemental Explanation for the Legal Basis of the Department's May 15, 2008, Determination of Threatened Status for the Polar Bear'', signed by then Acting Director Dan Ashe (hereafter referred to as Polar Bear Memo). As discussed in the Polar Bear Memo, a key statutory difference between a threatened species and an endangered species is the timing of when a species may be in danger of extinction (*i.e.,* currently on the brink of extinction), either now (endangered species) or in the foreseeable future (threatened species). A species that is in danger of extinction at some point beyond the foreseeable future does not meet the definition of either an endangered species or a threatened species.

As discussed in the Polar Bear Memo, because of the fact-specific nature of listing determinations, there is no single metric for determining if a species is ''in danger of extinction'' now. Nonetheless, the practice of the Service over the past four decades has been remarkably consistent. Species that the Service has determined to be in danger of extinction now, and therefore appropriately listed as an endangered species, generally fall into four basic categories. The best scientific data available indicates that the lesser prairie-chicken fits into the category: ''Species with still relatively widespread distribution that have nevertheless suffered ongoing major reductions in its numbers, range, or both, as a result of factors that have not been abated.'' However, the Polar Bear Memo goes on to explain that threatened species share some characteristics with this category of endangered species, ''Whether a species in this situation is ultimately an endangered species or threatened species depends on the specific life history and ecology of the species, the natures of the threats, and population numbers and trends.''

As discussed above, the foreseeable future refers to the extent to which the Secretary can reasonably rely on predictions about the future in making determinations about the future conservation status of the species. For the lesser prairie-chicken, information about the primary ongoing and future threats is reasonably well-known and reliable. As suggested by the Polar Bear Memo, species like the lesser prairie-chicken that have suffered ongoing major reductions in numbers and range due to factors that have not been abated may be classified as a threatened species if some populations appear stable, which would indicate that the entity as a whole was not in danger of extinction now (*i.e.,* not an endangered species). In the case of the lesser prairie-chicken, the best available information indicates that while there have been major range reductions (84 percent) as a result of factors that have not been abated (cumulative habitat fragmentation) and while there continues to be uncertainty around the current status of the species, particularly in the face of significant drought events in 2011 and 2012, there may be sufficient stable populations to allow the species to persist into the near future. The remaining populations are spread over a large geographical area and the current range of the species includes populations that represent the known diversity of ecological settings for the lesser prairie-chicken. As a result, it is unlikely that a single stochastic event (*e.g.,* drought, winter storm) will affect all known extant populations equally or simultaneously, therefore, it would require several stochastic events over a number of years to bring the lesser prairie-chicken to the brink of extinction due to those factors alone. Similarly, the current and ongoing threats of conversion of grasslands to agricultural uses, encroachment by invasive woody plants, wind energy development, and petroleum production are not likely to impact all remaining populations significantly in the near term because these activities either move slowly across the landscape or take several years to plan and implement. Therefore, because there may be sufficient stable populations to allow the lesser prairie-chicken to persist into the near future, it is not in danger of extinction throughout all of its range now, and more appropriately meets the definition of a threatened species (*i.e.,* likely to become in danger of extinction in the foreseeable future).

In conclusion, as described above, the lesser prairie-chicken has experienced significant reductions in range and population numbers, is especially vulnerable to impacts due to its life history and ecology, and is subject to significant current and ongoing threats in the foreseeable future. However, there may be sufficient stable populations to allow the species to persist into the near future. Therefore, after a review of the best available scientific information as it relates to the status of the species and the five listing factors, we find the lesser prairie-chicken is likely to become in danger of extinction in the foreseeable future throughout its range.

Critical Habitat Designation for Lesser Prairie-Chicken

Background

Critical habitat is defined in section 3 of the Act as:

(i) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features:

(I) Essential to the conservation of the species, and

(II) Which may require special management considerations or protection; and

(ii) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means using all methods and procedures deemed necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be relieved otherwise, may include regulated taking.

Critical habitat receives protection under section 7(a)(2) of the Act through the requirement that Federal agencies insure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not alter land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Instead, where a landowner seeks or requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the applicant is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical and biological features within an area, we focus on the principal biological or physical constituent elements (primary constituent elements such as roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type) that are essential to the conservation of the species. Primary constituent elements are the elements of physical or biological features that are the specific components that provide for a species' life-history processes, are essential to the conservation of the species.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. For example, an area formerly occupied by the species but that was not occupied at the time of listing may be essential to the conservation of the species and may be included in a critical habitat designation. We designate critical habitat in areas outside the geographical area occupied by a species only when a designation limited to its current occupied range would be inadequate to ensure the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas we should designate as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include articles published in peer-reviewed journals, conservation plans developed by States and Counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge.

Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species, considering additional scientific information may become available in the future. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to insure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions of section 9 of the Act if actions occurring in these areas may result in take of the species. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, HCPs, or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time a species is determined to be an endangered or threatened species. Our regulations (50 CFR 424.12(a)(1)) state that the designation of critical habitat is not prudent when one or both of the following situations exist: (1) The species is threatened by taking or other human activity, and the identification of critical habitat can be expected to increase the degree of threat to the species, or (2) such designation of critical habitat would not be beneficial to the species.

There is currently no operative threat to lesser prairie-chickens attributed to unauthorized collection or vandalism, and identification and mapping of critical habitat is not expected to initiate

any such threat. Thus, we conclude designating critical habitat for the lesser prairie-chicken is not expected to create or increase the degree of threat to the species due to taking.

Conservation of lesser prairie-chickens and their essential habitats will focus on, among other things, habitat management, protection, and restoration, which will be aided by knowledge of habitat locations and the physical or biological features of the habitat. In the absence of finding that the designation of critical habitat would increase threats to a species, if there are any benefits to a critical habitat designation, then a prudent finding is warranted. We conclude that the designation of critical habitat for the lesser prairie-chicken will benefit the species by serving to focus conservation efforts on the restoration and maintenance of ecosystem functions within those areas considered essential for achieving its recovery and long-term viability. Other potential benefits include: (1) Triggering consultation under section 7(a)(2) of the Act in new areas for actions in which there may be a Federal nexus where it would not otherwise occur because, for example, it is or has become unoccupied or the occupancy is in question; (2) focusing conservation activities on the most essential features and areas; (3) providing educational benefits to State or County governments or private entities; and (4) preventing inadvertent harm to the species.

Therefore, because we have determined that the designation of critical habitat will not likely increase the degree of threat to the species and may provide some benefit, we find that designation of critical habitat is prudent for the lesser prairie-chicken.

Critical Habitat Determinability

Having determined that designation is prudent, under section 4(a)(3) of the Act we must find whether critical habitat for the species is determinable. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(i) Information sufficient to perform required analyses of the impacts of the designation is lacking, or

(ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat. When critical habitat is not determinable, the Act allows the Service an additional year following publication of a final listing rule to publish a final critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

In accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and the regulations at 50 CFR 424.12, in determining which areas occupied by the species at the time of listing to designate as critical habitat, we consider the physical and biological features essential to the conservation of the species which may require special management considerations or protection. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, and rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historical geographical and ecological distributions of a species.

We are currently unable to identify critical habitat for the lesser prairie-chicken because important information on the geographical area occupied by the species, the physical and biological habitat features that are essential to the conservation of the species, and the unoccupied areas that are essential to the conservation of the species is not known at this time. A specific shortcoming of the currently available information is the lack of data about: (1) The specific physical and biological features essential to the conservation of the species; (2) how much habitat may ultimately be needed to conserve the species; (3) where the habitat patches occur that have the best chance of rehabilitation; and (4) where linkages between current and future populations may occur. Additionally, while we have reasonable general information about habitat features in areas occupied by lesser prairie-chickens, we do not know what specific features, or combinations of features, are needed to ensure persistence of stable, secure populations.

Several conservation actions are currently underway that will help inform this process and reduce some of the current uncertainty. Incorporation of the information from these conservation actions will give us a better understanding of the species' biological requirements and what areas are needed to support the conservation of the species.

The five State Conservation Agencies within the occupied range of the lesser prairie-chicken, through coordination with the Western Association of Fish and Wildlife Agencies Grassland Initiative, have been funded to develop a rangewide survey sampling framework and to implement aerial surveys during the spring (March through May) of 2012, and continuing into 2013. Implementation of these aerial surveys is important as they will enable biologists to determine location of leks that are too distant from public roads to be detected during standard survey efforts. Our critical habitat determination will benefit from this additional information and allow us to consider the most recent and best science in making our critical habitat determination.

Similarly, all five State Conservation Agencies within the occupied range of the lesser prairie-chicken have partnered with the Service and Playa Lakes Joint Venture, using funding from the DOE and the Western Governor's Association, to develop a decision support system that assists in evaluation of lesser prairie-chicken habitat, assists industry with nonregulatory siting decisions, and facilitates targeting of conservation activities for the species. The first iteration of that product, Phase I, went online in September 2011 (*http://kars.ku.edu/geodata/maps/sgpchat/*). This decision support system is still being refined, and a second iteration of the product (Phase II), under oversight of the Western Association of Fish and Wildlife Agencies, will provide additional information that will help improve evaluation of lesser prairie-chicken habitat. The Steering Committee of the Great Plains Landscape Conservation Cooperative has made completion of Phase II one of their highest priorities for over the next 18 months. The Lesser Prairie-chicken Interstate Working Group will be identifying the research and data needs for moving Phase II forward. Outputs derived from this decision support tool will help us more precisely identify the location and distribution of features essential to the conservation of the lesser prairie-chicken.

Additionally, the Service is actively pursuing the development of a population viability analysis that we anticipate will significantly inform the development of a critical habitat proposal. A population viability analysis is a modeling effort that is intended to estimate the likelihood of persistence of a population or species into the future. The analysis can be used to assess appropriate population targets that would be expected to support long term persistence, and can be used to compare and contrast a variety of potential management options.

Finally, the five State Conservation Agencies also are working to develop a

multi-State rangewide conservation strategy that likely will provide information on the location of focal areas where targeted conservation is anticipated to contribute significantly to long-term viability of the lesser prairie-chicken.

Consequently, while we recognize that the Act requires us to use the best available scientific information available at any given time when developing a critical habitat designation, we believe these additional efforts that are ongoing over the next 6 months or more will be vital pieces of information that will support a more well-reasoned critical habitat designation that will better contribute to the conservation of the species. Therefore, we have concluded that critical habitat is not determinable for the lesser prairie-chicken at this time.

Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of such review is to ensure that our determination of status for this species is based on scientifically sound data, assumptions, and analyses. We will send peer reviewers copies of this proposed rule immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the public comment period, on our use and interpretation of the science used in developing our proposal to list the lesser prairie-chicken.

We will consider all comments and information we receive during the comment period on this proposed rule during preparation of a final rulemaking. Accordingly, the final decision may differ from this proposal.

Public Hearings

Four public hearings have been scheduled on this proposal (see in formation in **DATES** and **ADDRESSES** sections above). Persons needing reasonable accommodations to attend and participate in a public hearing should contact the Oklahoma Ecological Services Field Office at 918–581–7458, as soon as possible. To allow sufficient time to process requests, please call no later than 1 week before the hearing date. Information regarding this proposed rule is available in alternative formats upon request.

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*)

This rule does not contain any new collections of information that require approval by Office of Management and Budget under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget control number.

National Environmental Policy Act

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), need not be prepared in connection with regulations adopted under section 4(a)(1) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes.

By letter dated April 19, 2011, we contacted known tribal governments throughout the historical range of the lesser prairie-chicken. We sought their input on our development of a proposed rule to list the lesser prairie-chicken and encouraged them to contact the Oklahoma Field Office if any portion of our request was unclear or to request additional information. We did not receive any comments regarding this request.

References Cited

A complete list of all references cited in this proposed rule is available on the internet at *http://www.regulations.gov,* or upon request from the Field Supervisor, Oklahoma Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT** section).

Authors

The primary authors of this proposed rule are the staff members of the Oklahoma Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Public Law 99–625, 100 Stat. 3500; unless otherwise noted.

2. Amend § 17.11(h) by adding an entry for ''Prairie-chicken, lesser'' in alphabetical order under BIRDS to the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical abitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	
BIRDS							
*	*	*	*	*	*	*	
Prairie-chicken, lesser.	(*Tympanuchus pallidicinctus*).	U.S.A. (CO, KS, NM, OK, TX).	Entire	T	.....	NA	NA
*	*	*	*	*	*	*	

* * * * *

Dated: November 26, 2012.

Daniel M. Ashe,

Director, Fish and Wildlife Service.

[FR Doc. 2012–29331 Filed 12–10–12; 8:45 am]

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FEDERAL REGISTER

Vol. 77 Tuesday,
No. 238 December 11, 2012

Part V

The President

Federal Register
Vol. 77, No. 238
Tuesday, December 11, 2012

Presidential Documents

Title 3—

The President

Proclamation 8914 of December 6, 2012

National Pearl Harbor Remembrance Day, 2012

By the President of the United States of America

A Proclamation

On December 7, 1941, our Nation suffered one of the most devastating attacks ever to befall the American people. In less than 2 hours, the bombs that rained on Pearl Harbor robbed thousands of men, women, and children of their lives; in little more than a day, our country was thrust into the greatest conflict the world had ever known. We mark this anniversary by honoring the patriots who perished more than seven decades ago, extending our thoughts and prayers to the loved ones they left behind, and showing our gratitude to a generation of service members who carried our Nation through some of the 20th century's darkest moments.

In his address to the Congress, President Franklin D. Roosevelt affirmed that ''with confidence in our Armed Forces—with the unbounding determination of our people—we will gain the inevitable triumph.'' Millions stood up and shipped out to meet that call to service, fighting heroically on Europe's distant shores and pressing island by island across the Pacific. Millions more carried out the fight in factories and shipyards here at home, building the arsenal of democracy that propelled America to the victory President Roosevelt foresaw. On every front, we faced down impossible odds—and out of the ashes of conflict, America rose more prepared than ever to meet the challenges of the day, sure that there was no trial we could not overcome.

Today, we pay solemn tribute to America's sons and daughters who made the ultimate sacrifice at Oahu. As we do, let us also reaffirm that their legacy will always burn bright—whether in the memory of those who knew them, the spirit of service that guides our men and women in uniform today, or the heart of the country they kept strong and free.

The Congress, by Public Law 103–308, as amended, has designated December 7 of each year as ''National Pearl Harbor Remembrance Day.''

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, do hereby proclaim December 7, 2012, as National Pearl Harbor Remembrance Day. I encourage all Americans to observe this solemn day of remembrance and to honor our military, past and present, with appropriate ceremonies and activities. I urge all Federal agencies and interested organizations, groups, and individuals to fly the flag of the United States at half-staff this December 7 in honor of those American patriots who died as a result of their service at Pearl Harbor.

IN WITNESS WHEREOF, I have hereunto set my hand this sixth day of December, in the year of our Lord two thousand twelve, and of the Independence of the United States of America the two hundred and thirty-seventh.

[FR Doc. 2012–30056
Filed 12–10–12; 11:15 am]
Billing code 3295–F3

Presidential Documents

Executive Order 13630 of December 6, 2012

Establishment of an Interagency Task Force on Commercial Advocacy

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to help level the playing field on behalf of U.S. businesses and workers competing for international contracts against foreign firms and to facilitate the growth of sales of U.S. goods and services around the world in support of the National Export Initiative, it is hereby ordered as follows:

Section 1. *Policy.* Executive Order 13534 of March 11, 2010, created the National Export Initiative (NEI), which provides unprecedented Federal support for exports of goods and services by American businesses. Executive Order 13534 also established the Export Promotion Cabinet to develop and coordinate the implementation of the eight priorities of the NEI, which include, but are not limited to, improving advocacy and trade promotion efforts on behalf of U.S. exporters, increasing access to export financing, and removing barriers to trade and enforcing U.S. trade laws and agreements. As part of these responsibilities, the Export Promotion Cabinet, in coordination with the Advocacy Center at the Department of Commerce, is focused on ensuring that the Federal Government's commercial advocacy effectively promotes exports by U.S. businesses, particularly by those firms competing for international contracts against foreign firms that may benefit from strong home government support. The creation of a new whole-of-government commercial advocacy task force that will provide enhanced Federal support for U.S. businesses competing for international contracts, coordinate the efforts of executive branch leadership in engaging their foreign counterparts on commercial advocacy issues, and increase the availability of information to the U.S. business community about these kinds of export opportunities, will ensure that U.S. exporters have more support for selling their goods and services in global markets.

Sec. 2. *Establishment and Membership.* There is hereby established an Interagency Task Force on Commercial Advocacy (Task Force).

(a) The Task Force shall be chaired by the Secretary of Commerce (Chair) and consist of senior-level officials from the following executive departments and agencies (agencies) designated by the heads of those agencies:

(i) Department of State;

(ii) Department of the Treasury;

(iii) Department of Defense;

(iv) Department of Agriculture;

(v) Department of Health and Human Services;

(vi) Department of Transportation;

(vii) Department of Energy;

(viii) Department of Homeland Security;

(ix) United States Agency for International Development;

(x) Export-Import Bank of the United States;

(xi) Millennium Challenge Corporation;

(xii) Overseas Private Investment Corporation;

(xiii) Small Business Administration;

(xiv) United States Trade and Development Agency; and

(xv) such other agencies as the President, or the Chair, may designate.

(b) The Chair shall designate a senior-level official of the Department of Commerce as the Executive Director of the Task Force, who shall be responsible for regularly convening and presiding over the meetings of the Task Force, determining its agenda, and guiding its work in fulfilling its functions under this order in coordination with the Advocacy Center at the Department of Commerce.

Sec. 3. *Functions.* The Task Force shall perform the following functions:

(a) review and prioritize commercial advocacy cases in which the Advocacy Center at the Department of Commerce has approved the provision of commercial advocacy services, and coordinate the activities of relevant agencies to enhance Federal support for such cases, in order to increase the success of U.S. exporters competing for foreign procurements;

(b) coordinate the engagement of agency leadership with their foreign counterparts regarding commercial advocacy issues, particularly with respect to their foreign travel and other occasions for engagement with foreign officials, and evaluate reports on the outcomes of such engagement, in order to increase the number of senior-level agency officials regularly and effectively advocating on behalf of U.S. exporters;

(c) develop strategies to raise the awareness of commercial advocacy assistance within the U.S. business community in order to increase the number of U.S. businesses utilizing commercial advocacy services;

(d) institute processes to obtain and distribute information about foreign procurement opportunities that may be of interest to U.S. businesses in order to expand awareness of opportunities for U.S. businesses to sell their goods and services to foreign governments;

(e) facilitate voluntary short-term personnel exchanges, not to exceed 120 days, between the Department of Commerce and other Task Force agencies, in order to cross-train Federal personnel to better serve U.S. exporters; and

(f) submit a progress report to the Export Promotion Cabinet every 180 days, which should include, but not be limited to, the number of commercial advocacy cases opened and successfully concluded, the number of commercial advocacy engagements by senior-level agency officials, and the number of U.S. businesses utilizing commercial advocacy services. The Advocacy Center at the Department of Commerce will be responsible for managing and tracking all commercial advocacy reporting for the Task Force.

Sec. 4. *Definitions.* For the purposes of this order:

(a) the term ''commercial advocacy'' shall mean Federal support for U.S. firms competing for foreign project or procurement opportunities; and

(b) the term ''foreign project or procurement opportunities'' shall mean export opportunities, including defense export opportunities, for U.S. businesses that involve foreign government decisionmakers, including foreign government-owned corporations.

Sec. 5. *General Provisions.* (a) The Commerce Department shall provide funding and administrative support for the Task Force to the extent permitted by law and consistent with existing appropriations.

(b) Nothing in this order shall be construed to impair or otherwise effect:

(i) the authority granted by law, regulation, Executive Order, or Presidential Directive to an executive department, agency, or the head thereof; and

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party

against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
Washington, December 6, 2012.

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Federal Register

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H.R. 915/P.L. 112–205

Jaime Zapata Border Enforcement Security Task Force Act (Dec. 7, 2012; 126 Stat. 1487)

H.R. 6063/P.L. 112–206
Child Protection Act of 2012 (Dec. 7, 2012; 126 Stat. 1490)

H.R. 6634/P.L. 112–207
To change the effective date for the Internet publication of certain financial disclosure forms. (Dec. 7, 2012; 126 Stat. 1495)

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